### N.C. Office of Indigent Defense Services

# The Challenge: Evaluating Indigent Defense

Innovation in the Art and Practice of Indigent Defense

June 2009



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### The Challenge: Evaluating Indigent Defense

Innovation in the Art and Practice of Indigent Defense Services

### Introduction

Through its Systems Evaluation Project (SEP), the North Carolina Office of Indigent Defense Services (IDS) is developing statistical indicators to measure how well we meet the needs of our clients, the criminal justice system, and the community. These indicators will provide a picture of system performance based on concrete data. But before we can develop indicators of system performance, we need to define success. What does high quality indigent defense representation look like? What outcomes should we expect for our clients? What goals should we expect the system to accomplish?

As a preliminary step to defining North Carolina indigent defense goals and expectations, SEP undertook two tasks. First, SEP hosted a series of focus groups or round table discussions across the state to discover how well the indigent defense system was performing in North Carolina. SEP invited indigent defense clients, defense attorneys, prosecutors, judges, law enforcement, probation officers, corrections, and the community to tell us what the system was doing well and not doing well. The report summarizing the results of the round tables—entitled Results from IDS Round Table Discussions: What Clients, Indigent Defense Attorneys, Justice System Partners, Law Enforcement, and the Community Say about North Carolina's Indigent Defense System—is posted on the IDS website at www.ncids.org under the Systems Eval. Project link.

Second, SEP completed an extensive literature review of new developments in criminal justice research, innovations in strategies or approaches to the practice of indigent defense, and methods to evaluate indigent defense services. That research is the basis for this report.

Ultimately, SEP hopes this research report will assist the IDS Commission in determining what it wants North Carolina's indigent defense system to accomplish and how it will define success. SEP also hopes it will assist other indigent defense organizations as they seek to define themselves and improve services.

SEP understands this type of report will never be exhaustive, but we tried to generate a list of topics that would help indigent defense practitioners understand the changes and shifts in the social forces that impact indigent defense, our clients, and the justice system, as well as identify new strategies and solutions that have emerged in response to these changes.

SEP staff reviewed law and social science journals, government agency publications, and research institute periodicals. SEP staff also looked for indigent defense agencies, law school programs, and non-profit organizations with data-driven, empirically proven results translating theory into practice and, whenever possible, tried to get information directly from those agencies to learn from their experiences.

For each topic, SEP staff sought to address the following:

- A general overview of the issue;
- The real effects the issue has on our clients and communities;
- Notable approaches, resources, and innovative strategies adopted by other jurisdictions;
- Identification of the additional attorney responsibilities raised by the issue;

- Identification of the additional system responsibilities raised by the issue;
- How the issue impacts the community; and
- Information on the costs of innovative programming.

Finally, the report includes detailed citations and a bibliography, to provide a complete listing of the sources and contact persons used to create the report. One of our research goals was to provide enough background information, contacts, websites, and key documents to give interested parties the ability to follow up on any of the initiatives presented in the report should they desire to replicate or adapt them to meet local needs.

For readers looking for sections on the more traditional aspects of practicing criminal defense law, such as ensuring the independence of the defense function and ensuring attorneys have a command of the law, the report takes these as a given and assumes they have been well documented and discussed within the defense community. Instead, the report focuses on newly emerging theories and practices in order to expand the horizons of our discussions as much as possible.

Please note that the report focuses primarily on the adult criminal justice system. Tackling juvenile and civil cases handled by indigent defense agencies is the next item on SEP's agenda, once system performance indicators for the adult criminal system have been developed.

For more information on the Systems Evaluation Project, please visit the IDS website at www.ncids.org.

### Current State of the Criminal Justice System

The criminal justice system is made up of three main parts: law enforcement, the adjudication component (including the courts, prosecution, and defense), and corrections. Over the past four decades, tremendous changes and shifts in our nation's social policies have had an immense impact on the criminal justice system and on indigent defense. The most dramatic phenomenon has been the exploding incarceration rates in the United States.

### ■ The U.S. Becomes the Largest Prison Warden in the World

The United States incarcerates more people than any nation<sup>1</sup>-- even China, which has a population that is more than four times that of the U.S.<sup>2</sup> At the start of 2008, the American penal system held more than 2.3 million adults in prison and jail.<sup>3</sup> More than 1 in every 100 adults is currently behind bars in the U.S.<sup>4</sup> How did the U.S. become the biggest prison warden in the world? We made policy choices.

### U.S. Policies Choose to Incarcerate People Rather than Solve the Underlying Social Problem

Since the early 1970s, the number of people in prison has grown 500%.5 This explosion in prison and jail populations was not driven by a parallel explosion in crime. 6 Instead, the U.S. has become the biggest prison warden in the world because of the policy choices we have made over the last decades. The policymakers who argued we needed to wage a war on crime, on drugs, and on terrorism, and have zero tolerance in our schools, won over the minds of the American people and implemented a rash of "tough on crime" policies over the years. Federal sentencing guidelines and mandatory sentencing in our court systems put more people behind bars for longer periods of time. In addition, tough on crime policies criminalized more behaviors, including juvenile behaviors that were once considered part of the learning process of growing up. In one sense, the tough on crime policies have been very effective. The U.S. is incarcerating people at an unprecedented rate. As of June 2006, one in six Americans or 48 million people has a criminal history. From a state perspective, in North Carolina in 2003, "tough on crime" policies resulted in 1 in every 6 adults over the age of 16 having a criminal record.8

What our policies chose not to do was solve the underlying problems that make our communities unsafe.

- Drug Use: Instead of understanding and trying to mitigate the reasons people use drugs,
   "tough on crime" policies chose to incarcerate drug users for longer periods of time.
- Juvenile Delinquency: Instead of understanding the factors that led to an increase in violence in our schools, "tough on crime" policies implemented zero tolerance policies that sent juveniles into the criminal justice system at alarming rates. The Denver public school system is a good example of this trend. Between 2000 and 2004, the Denver public school system referred juveniles to law enforcement at almost four times the rate they had in previous years.9 Zero tolerance in our school systems was aimed at reducing violence in our schools, but, true to the concept, schools were not to make discretionary decisions or back away from zero tolerance. Thus, zero tolerance resulted in perverse outcomes like criminally charging children for bringing aspirin or water pistols to school.
- Mental Illness: Instead of treating the mentally ill, mental health policies and criminal justice policies have had the combined effect of incarcerating the mentally

ill rather than treating them. A national shift away from institutional care to community-based care closed large numbers of state mental institutions and released thousands of former mental hospital patients, still suffering from mental illnesses, into neighborhoods around the country, with no

assistance.<sup>10</sup> At the same time, many police departments instituted "zero tolerance" policies, which arrested people for offenses such as loitering, urinating in public, and disturbing the peace, offenses which are often committed by the mentally ill, whose symptoms frequently manifest in unacceptable anti-social behaviors.<sup>11</sup>

### ■ "Tough on Crime" Policies Consume State and Local Resources

"Tough on crime" policies have been extremely expensive. State and local governments had to fund law enforcement, court systems, and corrections at higher levels than previously, especially corrections. With 500% more people to incarcerate, corrections needed more money to build more prisons. In 1987, state governments spent \$10.6 billion on corrections. By 2007, state correction budgets had grown 315% and were costing states \$44 billion per year. In 2007, on average, state correctional agencies consumed 6.8% of state general funds, which means \$1 in every \$15 in the state's main pool of discretionary money went to corrections.<sup>12</sup> And that price tag is for corrections only. States also had to fund law enforcement and the court system, including indigent defense, to carry through the tough on crime policies. In North Carolina, justice expenditures have been on an unabated upward trajectory. Between 1982 and 2000, total justice expenditures have grown 860.5%, from \$313 million to \$3.01 billion, and they have continued to rise.13

Total Justice Expenditures and Percent Change by Level of Government in North Carolina				
Fiscal Year	Total Justice	State	Local	
1982	313,400,000	76,774,000	236,626,000	
1988	330,014,000	288,345,000	41,669,000	
1992	1,613,194,000	925,609,000	687,585,000	
1999	2,824,786,000	1,604,136,000	1,220,650,000	
2000	3,010,205,000	1,663,902,000	1,346,303,000	
Percent Change 1982-2000	860.5%	2067.3%	469.0%	

Source: Governors Crime Commission, A Discussion of Incarceration and Its Alternatives in North Carolina, July 2007.

### "Tough on Crime" Policies Crowd Out Other Priorities

Budgets force people to make choices. With "tough on crime" policies consuming more and more government dollars, states were forced to put less money into other priorities. Major losers were education and social programs for persons in economic distress. Between 1987 and 2007, educating our youth lost out to building prisons; in adjusted dollars, combined state spending on corrections rose 127% compared to education, which rose only 21%. <sup>14</sup> Ironically, education and social services are precisely the factors that prevent criminal behavior.

### ■ "Tough on Crime" is Counterproductive: Policies Exacerbate Recidivism

At the same time that our criminal justice policies were arresting and incarcerating more people than ever before, and budget limitations were forcing states to cut back on education and other social programs that tend to prevent crime, "tough on crime" policies have had the unintended effect of preventing former offenders from successfully reintegrating back into the community. Ironically, by raising substantial barriers to successful reentry, the policies that were intended to make our communities safer have made it more likely that former offenders will recidivate. We are less safe, because each time a former offender reoffends, someone new is victimized.

Today, prisons are less interested in rehabilitation than in punishment. Education, job training, substance abuse treatment, anger management programs, and the like have been significantly reduced or eliminated from prisons and jails. Parole programs, which once served to help offenders reenter the community, have been largely made redundant since mandatory sentencing eliminated parole for most new offenses.

There has been a proliferation of civil penalties or "collateral consequences" attached to criminal convictions that deny or bar former offenders access to

public housing, student loans, professional licenses, public benefits, and a host of other social programs that helped ease the transition from incarceration to society.<sup>15</sup>

Today it matters not whether the ex-offender has "paid her debt to society" by serving time and complying with the sentence. The conviction record has become a modern-day scarlet letter.

— Robert M.A. Johnson, former President of the National District Attorneys Association, Have All Convictions Become a Life Sentence? (2007)

State criminal justice systems sell criminal record information to private vendors who, in turn, sell the information to the public. An increasingly litigious society, fear of lawsuits, post 9/11 fears, and media coverage that sensationalize violent crimes have made employers, landlords, and educational institutions reluctant to hire or accept former offenders into their programs. The ease with which they can now perform criminal background checks has made enrolling in school, and finding employment or housing, difficult for former offenders. To understand how problematic the "hard-to-employ" are becoming for communities, consider the following:

- In many states, including North Carolina, criminal record information is shared with non-law enforcement entities for employment purposes until the subject reaches 80 years old or dies.<sup>16</sup>
- In 2003, in North Carolina, 1 in 6 adults over the age of 16, or 1,077,300 people, had a criminal record.<sup>17</sup>
- An individual retains a criminal record, which will appear in a criminal record check, even if their case was dismissed or they were found not guilty, and as much as 30% of criminal arrests end in dismissal.

Advances in technology, which have allowed government agencies to easily exchange database information, have removed the geographical barriers that once existed. Individuals who were once able to move to a new state in order to "start over" now find their criminal records follow them wherever they go.

These tough on crime policies have made it harder than ever for former offenders to find housing, obtain employment, and once again become an accepted member of the community.<sup>18</sup>

The idea that, once you have paid your debt to society, you have the chance to become a productive member of society seems more myth than reality. According to the U.S. Department of Justice, two out of three former offenders will be re-arrested for new crimes within three years of their release and more than half will be re-incarcerated.<sup>19</sup>

### The Failure of "Tough on Crime" Policies

After decades of tough on crime policies, billions in corrections and criminal justice spending at the expense of education and other social programs, and incarcerating Americans at unprecedented rates, what have been the results of these efforts?

#### Failure to Prevent Crime

In many ways, these policies have failed. If the goal was to make our communities safer, these policies have failed to prevent crime, given one in six Americans or 48 million people have a criminal history. We have created a criminal justice system that locks large numbers of offenders into a cycle of arrest, release, and re-arrest.

Our public school system is failing. According to Department of Education statistics, in 2003-2004, the national high school graduation rate was 69.9%, and in the 50 largest cities in the U.S., only 60.4%.<sup>21</sup> Conversely, this means that almost one third of U.S.

high school students, and 2 in every 5 students in the 50 largest cities in the U.S., failed to graduate. Moreover, violence in our schools has not diminished, but zero tolerance school discipline policies have pushed students away from an academic track to a future in the juvenile justice system.

Persons with mental illness remain untreated. Instead they are periodically housed in the criminal justice system at great expense. Prison is a very ineffective and costly way to deal with mental health issues.

Inmates, families, guards, judges, prosecutors, and police are in unique agreement that our broken system of punting the most seriously mentally ill to the criminal justice system must be fixed.

— US Congressman Ted Strickland, Ohio (2001)

Although there is some deviation from state to state, the average annual per prisoner operation cost was \$23,876 in 2005. In comparison, the average annual per client operation cost for community mental health treatment was \$4,000 to \$7,000 in 1996.<sup>22</sup>

The revolving door of our criminal justice system compromises rather than ensures public safety and drains state resources from other needed program areas, such as education and mental health systems.

#### The Distortion in the Determination of Guilt

Criminal justice policies over the past decades have placed a tremendous strain on the criminal justice system, including indigent defense systems.

Despite the increases in criminal justice funding, the court system is straining from the burden of "tough on crime" policies. The courts, the prosecution, and

indigent defense are chronically short-staffed and struggle to process overwhelming caseloads due to budgets that have not grown apace with the number of cases. The result is a criminal justice system that is being forced to compromise the pursuit of justice to the pursuit of efficiency and processing cases. As the number of cases grows, the court system necessarily becomes more concerned with keeping up with the docket and less concerned about justice. The pressure to process cases can lead to perverse justice outcomes, such as defendants pleading guilty even when they are not guilty because they cannot afford the social costs involved in repeated court appearances and taking their case to trial. If defendants cannot afford bond or are not granted pre-trial release, they face losing their job, home, the ability to support their family, and sometimes custody of their children.<sup>23</sup> The negative consequences of pre-trial incarceration are so severe; pleading guilty to a crime one did not commit can prove to be a better bargain than pursuing one's innocence.

In addition to serious financial concerns, defendants face the combined forces of plea bargaining, mandatory sentencing, discovery laws that often do not favor defendants, and the practice of penalizing defendants for going to trial. Given the convergence of these forces, the rational offender, no matter how factually or legally innocent, will be pushed hard to accept a plea rather than proceed to trial. Today, the practice of plea bargaining is the norm and court budget appropriations are based on the assumption that almost every case will end in a plea. In 2000, the guilty plea rate in U.S. state courts was 96%. <sup>24</sup> Plea bargains allow the prosecution and the defense to dispose of cases at the pre-trial stage, which means fewer resources have to be expended on investigation or advocacy.<sup>25</sup> When plea bargaining is combined with mandatory sentencing, prosecutors are left with little judicial oversight, since by accepting a plea bargain the prosecution avoids judicial and public scrutiny over their charging practices and whether they are prosecuting cases with sufficient proof to convict.<sup>26</sup> Plea bargains work in two ways. In return for a guilty plea, defendants are offered a reduced

sentence and/or a reduction in the charge. In "sentence bargaining," where prosecutors agree to a reduction in the sentence in exchange for a plea, judges can intervene if the sentence agreement between the prosecution and the defense is unreasonable. But with "charge bargaining," where the prosecution agrees to reduce the charge in exchange for a plea, judges only see the end result. The result of charge bargaining is

The role of the judiciary becomes weakened while that of prosecutors, whose decisions about charging determine the applicability of the mandatories, becomes dominant. In the majority of U.S. jurisdictions, judges do not participate in guilty plea negotiations, so the judiciary has little influence over charging . . . Under such a system, the prosecutor's charging decision usually determines the sentence.

— Candace McCoy and Thomas Cohen,
Mandatory Sentencing, The Encyclopedia of
Crime and Justice (2001)

that prosecutors essentially control all stages of adjudication, including charging, investigating, determining the facts, obtaining convictions, and sentencing, especially in jurisdictions where there is mandatory sentencing in effect.<sup>27</sup> In addition, state discovery laws for criminal cases typically do not favor the defendant. For instance, defendants often do not have the right to obtain a sworn deposition from witnesses and witnesses are not obligated to talk to defense counsel pre-trial, as they are in civil cases. Defense attorneys often do not have access to the police report or witness statements. The result of narrow discovery requirements is that defendants and their attorneys have less ability to judge the strength of the prosecution's case or prepare a defense in advance of trial. Further disadvantaging defendants is the practice of punishing defendants who defend their presumption of innocence by going to trial with

harsher sentences than defendants who plead guilty to the same crimes.<sup>28</sup> One study comparing sentence outcomes for pleas compared to jury trials in serious felony cases found that, after controlling for offense type, number of charges, criminal justice status at time of arrest, prior record, attorney type, geographic location, pre-trial status, and age, race, and gender of the defendant, sentences following jury trials were 44.5 months or 3\% years longer than those following guilty pleas.<sup>29</sup> The study concluded that the data results "dispel[] the notion that the trial penalty can be explained away as a function of differing types of cases concluded at plea versus trial, or the idea that although the penalty exists, it is not severe. In fact, it is so severe that the legal profession must start to ask whether it amounts to institutionalized coercion."<sup>30</sup>

Stephen Schulhofer, a professor of law at New York University School of Law, in an interview in a Frontline program entitled The Plea (2004), summed up the situation this way: "The major problem with plea bargaining is that it forces the party into a situation where they have to take a guess about what the evidence is, about how strong the case might be, and they have to make that guess against the background of enormously severe penalties if [they] guess wrong. So defendants, even if they have strong defenses, and even if they are innocent, in fact face enormous pressure to play the odds and to accept a plea. And the more likely they are to be innocent, and the more strong their defenses are, the bigger discount and the bigger benefits the prosecutor will offer them. Eventually at some point it becomes so tempting that it might be irresistible, especially when the consequences of guessing wrong are disastrous."31

These sentiments are echoed by Illinois criminal-defense attorney Jeremy J. Richey: "People are particularly susceptible to taking a plea when a minor crime is involved. For example, suppose that a guy is pulled over for speeding. After a consent search, the police find a marijuana joint. Furthermore, suppose the guy is a straight arrow and would never smoke marijuana. Where did the joint come from? The guy's younger hippie brother borrowed the car the day

before the stop; the joint is his. The State offers the straight arrow a year of judicial supervision plus certain fines, fees, and costs. Supervision means that the case can be expunged two years after a judge discharges the guy from the sentence of supervision. The straight arrow knows that he isn't going to do anything to jeopardize his eligibility for expungement and he has the money to pay the fines. He decides to plea[d] guilty because he fears that if he goes to trial and is found guilty, the judge will punish him for going to trial by not sentencing him to judicial supervision."<sup>32</sup>

The system in its details puts the defendant under even more pressure because very often in less serious cases—by that I mean still felonies, but they could be relatively routine felonies like a robbery without a firearm or a burglary—the defendant is in jail awaiting trial. He may have to wait months or close to a year for a trial, and his defense attorney comes in and says, "Well, if you're innocent and you want to go to trial, you stay here for a year. If you're guilty and you want to plead guilty you can go home right now," so what does a person do in that situation? It's a terribly hard choice. Even if you're convinced you're innocent and even if you're convinced that the evidence will show that you're innocent, the pressure that the system creates is so strong that it forces people to say that they're guilty and to accept a record of conviction. So that's just a disaster in terms of effective protection of the innocent.

— Stephen Schulhofer, Professor of Law, NYU School of Law, PBS Frontline interview, The Plea, 2004. The unintended effect of our nation's tough on crime policies has been a justice system that many criminal justice scholars believe coerces guilty pleas from those who believe they are legally or factually innocent. Ironically, the guiltiest are punished with the least severity, while the least guilty often cannot afford the financial and social costs and the legal risks that accompany forcing the state to prove its case at trial under judicial and public scrutiny, thus ensuring accountability in our legal system.

### "Tough on Crime": Tough on the Criminal Justice System, Tougher on Indigent Defense

Compromising the justice system further is the fact that our nation's criminal justice policies have led to indigent defense systems that are in crisis in many areas of the country. Even more so than other criminal justice system actors, indigent defense budgets have not kept pace with the rising number of cases, which has led to overwhelming caseloads for many public defenders and low pay for private appointed counsel. In fact, in seven states, public defender caseloads have reached such high levels that they have been forced to refuse to accept more cases, and several have had to resort to suing the state for the right to refuse more cases. Tight budgets, overwhelming caseloads, and the revolving-door nature of the justice system have led to diminished quality in defense representation, increased attorney burnout and cynicism, and significant pressure to plead cases quickly.

Crushing caseloads are pressuring defense attorneys to turn around cases quickly, at a time when the more punitive nature of sentences, the growing number of civil consequences, the life-long ramifications of having a conviction, and the barriers to reentry mean defense counsel need to vigorously defend client rights more than ever.

### No Systemic Response

Compounding the impact of these shifts and changes in the social forces that impact indigent defense is the lack of indigent defense system level resources. As a profession, indigent defense has little oversight and, effectively, little data-gathering infrastructure. Only 26 states even have statewide systems and very few have the budget resources to devote staff to the work of research and policy analysis. In fact, indigent defense as a whole collects very little data and large numbers of defense attorneys have a distrust of data and often oppose policies that would further more data collection. The lack of system level resources has hampered indigent defense's ability to understand and respond to the shifting social forces that shape and change the criminal justice system at a time when they need that ability the most.

In addition, the criminal justice system is a divided system. The various system actors, defense attorneys, prosecutors, and judges, tend to treat each other as adversaries and blame each other for their problems rather than working together to combat the forces that shape the system.

#### Indigent Defense at a Crossroad

A number of criminal justice researchers believe that indigent defense is poised at a crossroad similar to what occurred within law enforcement during the 1980s and 1990s. Overwhelmed by the rise in crime, a cycle of recidivism, and tight budgets, many law enforcement agencies began to reassess what it meant to provide policing. The traditional model of policing was that the sole purpose of law enforcement was to arrest perpetrators of crime. But new findings in criminal justice research and a growing frustration with the cycle of crime and recidivism led many police departments to reach a different conclusion. They came to believe the true purpose of law enforcement was broader than simply making arrests. The true purpose of law enforcement was to keep communities safe. This reassessment led to innovations in policing, such as the concept of

"community policing." Redefining their mission prompted police departments to put their resources into new uses, such as crime prevention strategies, and establishing ties with the community to build support for law enforcement funding and to increase the willingness of communities to assist police during the course of police work, such as investigating crime.

In a similar manner, pockets of indigent defenders all over the nation have begun reassessing what it means to provide quality representation. They have been reevaluating how they can serve their clients better and what role indigent defense should play in the community. In the process, many defenders are concluding that an expanded vision of indigent defense is needed—that indigent defense needs to be more than a system that looks no further than getting the shortest amount of jail time for a client, especially given the egregious procedural injustices and the proliferation of collateral consequences associated with even minor crimes. Many defenders believe indigent defense needs to be part of the solution to breaking the cycle of recidivism and solving the other fundamental problems facing the criminal justice system and our clients. They do not want to be another government entity engaged in the endless task of processing people and cases without making the world a better and safer place to live.

Across the country, a growing number of indigent defense agencies have gone in new directions. Individual agencies have come up with innovative ideas and strategies to try to help clients in a changed world, stop the cycle of recidivism, and assist clients with reentry. New concepts, like procedural justice, holistic and client-centered representation, new models of doing indigent defense work, innovative uses of technology, and a growing hunger for data have surfaced.

Indigent defenders have been reevaluating what it means to provide quality representation:

- Is it the number of jail days in a sentence?
- Is it preventing procedural injustices?
- Is it knowing and advising our clients about the collateral consequences of their plea and what will happen to them as a result?
- Is it reforming a system where unchecked charging practices, reduced judicial scrutiny, and a coercive plea bargaining system are forces that can overwhelm a defendant's right to due process?
- Is it the chance we give clients to fix the underlying problems that brought them into the legal system and break the cycle of recidivism?
- Is it thinking about re-entry when we are assembling the facts of the case and negotiating pleas and sentences?
- Is it systemic outcomes, like partnering with other system actors to create specialized courts that can treat our clients in a more humane and fair way?
- Is it going out into the community and educating people on their legal rights, how to interact safely with the police, and how to avoid entanglement with the criminal justice system?
- Is it letting the public know about all the potential consequences if they do become entangled with the justice system and what help is available in their community to prevent that from happening?
- Is it advocating against particularly oppressive laws, like the death penalty, structured sentencing, or habitual felon laws?
- Is it giving a voice to clients in indigent defense policymaking by having client advisory boards or a position(s) on indigent defense commissions to represent client interests?
- Is it all of the above?

### Conclusion

This is the challenge facing indigent defense agencies. At a time when the consequences of a conviction are more severe and long-term than ever before and the justice system is less able to pursue the ideals of justice, indigent defense agencies have to decide what it means to provide quality legal representation in the criminal justice system we have today. Systems take time to change and a new vision will not take hold overnight. But indigent defense needs to define what high quality representation looks like.

Then indigent defense must follow up by building the statistical tools to measure indigent defense system outcomes. Agencies need to start collecting the data that will demonstrate the tradeoffs society is making with its criminal justice policies, tradeoffs that are largely hidden from the public and policymakers and even the court system. Through data, indigent defense agencies can demonstrate the pivotal role we play, not only in keeping the power of the government in check, but in how we keep communities from paying unnecessary costs and keep the system from punishing minor offenses with a cascading wave of unintended effects that cannot be undone.

The purpose of this report is to help indigent defense organizations decide for themselves what their vision of the future looks like.

### System Evaluation Project (SEP) Next Steps

This report provides a menu of new ideas, concepts, and innovative strategies that, hopefully, will assist the IDS Commission and other defense agencies in defining their vision of success. Each section provides a summary of the latest developments in criminal justice research and what those developments mean for the practice of indigent defense.

SEP's next step will be to develop a draft list of indicators to measure system performance. The measures must be reliable and meaningful so that decisions based on their results will improve indigent

defense services. SEP will work with the Systems Evaluation Committee to further refine these measures. Ultimately, the Systems Evaluation Committee will make recommendations to the IDS Commission regarding:

- 1. How North Carolina should define quality representation;
- 2. What North Carolina indigent defense system outcomes and goals should be; and
- 3. Which indicators of system performance should be developed?

For example, the Systems Evaluation Committee might recommend that securing pre-trial release is an essential outcome to quality representation. To measure system performance in that area, SEP would develop indicators to measure annual pre-trial outcomes for our clients and quantify the impact of pre-trial release on the community, such as:

- The average number and frequency of days in jail pre-trial, and as a ratio to the maximum sentence the court could have imposed;
- The percentage of clients out on personal recognizance;
- The percentage of clients out on bond and a breakdown of average cost and percent of the bond that was non-refundable:
- The percentage of cases that ended in dismissal or a not guilty verdict where the defendant was incarcerated; and
- The attorney entry point in the case (e.g., at the first bond hearing or later).

To measure the impact of client pre-trial outcomes on the community, SEP might develop indicators such as:

 The percentage of clients incarcerated pretrial who lost their job (especially for dismissals and not-guilty dispositions);

- The percentage of clients incarcerated pretrial who lost their housing (especially for dismissals and not-guilty dispositions);
- The percentage of clients incarcerated pretrial who lost custody of one or more children (especially for dismissals and not-guilty dispositions);
- The percentage of clients who applied for unemployment benefits after pre-trial incarceration and the estimated cost of these services;
- The percentage of clients who had one or more children go into foster care during pretrial incarceration and the estimated cost of these services; and
- The percentage of clients who applied for one or more social programs, like welfare or food stamps, after pre-trial incarceration and the estimated cost of these services.

To measure system performance, ideally we would collect client case data on type of offense, case disposition, county, type of attorney, prior record level, race, gender, socio-economic status, etc. so that the data can be analyzed in a number of ways. Armed with the Systems Evaluation Committee's recommendations, the IDS Commission can then define the project goals and SEP will start to develop actual performance indicators and their data-collection apparatus.

In turn, system performance results can then be used by the IDS Commission to improve the indigent defense system, identify regions that are in trouble or employ best practices, advocate for criminal justice system reform with other system actors and the legislature, and evaluate the impacts of policy decisions.

### Final Thoughts

SEP hopes this report will help the IDS Commission as well as other indigent defense agencies. SEP considers this report a work in progress and fully expects to add to it as IDS Commissioners, indigent defense practitioners, and other criminal justice researchers raise concerns and topics not currently covered. SEP will distribute this report to its participant mailing list, which consists of indigent defense practitioners and criminal justice researchers around the country who have requested that SEP keep them informed about the project's progress. SEP hopes to collect suggestions from participants on additional concerns and topics that should be included. Moreover, SEP staff believes building a compendium on criminal justice research and its impact on indigent defense from a system perspective, such as this report, is an invaluable undertaking that would benefit not only the indigent defense community but all criminal justice actors. SEP has created an indigent defense research listsery for anyone interested in discussing system evaluation issues and the latest innovations in the art and practice of indigent defense. If you would like to become a member of this listsery, please contact Daryl Atkinson, SEP Project Coordinator, at 919-560-3380 or daryl.v.atkinson@nccourts.org and he will be happy to include you. Finally, it is a hope of SEP staff that one day someone will host an Internet website where indigent defense agencies can post short descriptions of the innovative strategies they are trying along with contact information. Such a website would help practitioners avoid "reinventing the wheel" and build a stronger sense of community.

<sup>1</sup> Jenifer Warren, *One in 100: Behind Bars in America* 2008, 2008 The Pew Charitable Trusts Public Safety Performance Project 5.

<sup>2</sup> https://www.cia.gov/library/publications/the-world-factbook/print/ch.html; https://www.cia.gov/library/publications/the-world-factbook/print/us.html.

3 *Id*.

4 Id. at 3.

5 Marc Mauer & Ryan S. King, *Uneven Justice: State Rates of Incarceration By Race and Ethnicity*, 2007 The Sentencing Project 1.

6 Warren, supra note 1, at 3.

7 Robert M.A. Johnson, *Have All Convictions Become a Life Sentence*, 22 Crim. Just. 2007, at 1.

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10 Henry J. Steadman et al., *The Impact of State Mental Hospitals Deinstitutionalization on United States Prison Populations*, 1968-1978, The J. Crim. L. & Criminology, 1984, at 474-90.

11 Paula M. Ditton, *Mental Health Treatment of Inmates and Probationers*, 1999 Bureau of Justice Statistics 4.

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13 Douglas Yearwood, *A Discussion of Incareration and Its Alternatives in North Carolina*, The NC Governor's Crime Commission, 8-9 (2007) (justice expenditures include law enforcement, the criminal justice system (including indigent defense and juvenile justice), and corrections).

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20 Robert M.A. Johnson, *Have All Convictions Become a Life Sentence*, 22 Crim. Just. 2007, at 1.

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23 Id.

24 Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 Crim. L. Q., Mar. 2005, at 8.

25 Id. at 12.

26 Id. at 3.

27 Id. at 17.

28 Michael O'Hare, *Plea Bargaining and Procedural Justice*, Marquette Univ. L. S. 2007, at 11.

29 Id.

30 McCoy, supra note 24, at 25.

31 PBS Frontline special, *The Plea*, 2004, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/plea/i nterviews/schulhofer.html.

32 http://ecilcrime.com/2008/08/13/how-many-innocent-people-plea-guilty/.

# Part I: Alternative Theories of Indigent Defense

Over the past few decades, the idea of what constitutes quality indigent defense services has been evolving and new theories of indigent defense have supplanted old models of practice. This section introduces a number of those theories and highlights programs that have put theory into practice.

- 1. Procedural Justice
- 2. Holistic Advocacy
- 3. Restorative Justice

### **Procedural Justice**

#### Scenario 1

John J. is married and has two small children. He works as a day laborer with a construction company, and he and his wife are working hard to keep up with the bills, especially the rent on their mobile home. Occasionally, John goes to the bar with the rest of the construction crew to drink a few beers and reflect on the past week's work. Three weeks ago, after drinking with his co-workers, John attempted to drive home but was pulled over by the police. He was searched, arrested, and charged with driving while intoxicated and possession of stolen property. John was in possession of some expensive tools from the work site and the police suspected that the tools may have been stolen. It took a week before an attorney was assigned to his case. As a result, John was arraigned and bond was set at \$1,000 without his defense counsel being present. He sat in jail for three weeks hoping that his wife could scrape together enough money to post bond. During that time he lost his job, several bills lapsed, and the rent on the trailer became delinquent. His family was in crisis and he was completely powerless. Eventually, John's defense counsel was able to get the possession of stolen property charge dismissed and John was released on a reduced cash bond. Ultimately, John was found guilty of the DWI and received a term of probation, but irreparable damage was done to John's perception of the criminal justice system. Since the loss of his job, John has had to apply for unemployment benefits. Even more humiliating, John and his family have been forced to apply for food stamps in order to feed his children until he could secure another job.

#### Issue

The theory of procedural justice—that the process employed by the justice system should be as just as the outcome itself—emerged in the social sciences in the 1970's. The theory provides that a defendant

should not be punished by going through the justice process, particularly in the initial stages of the case, because there has been no determination of guilt and the system should not punish the innocent. Moreover, the system should not punish defendants who are found guilty beyond the maximum sentence the court is legally allowed to impose. Procedural justice theory recognizes that the *process* of dispensing justice is as important as the outcome.

#### When Justice is a Crime

— Title of an investigative reporting series in the Atlantic Journal, March 21, 2002

Unfortunately, studies that have looked at court processes and the outcomes they generate have found the converse of procedural justice is often the reality in our court system. A range of studies have found that in many courts, especially the lower courts that deal with minor criminal matters, simply traversing the criminal justice system imposes harsh penalties that apply indiscriminately to the innocent and guilty alike. Moreover, there is a growing body of empirical evidence showing that, due to procedural injustices, the public has lost respect for the justice system, which negatively impacts the well-being and safety of communities.

#### Procedural Justice and Pre-trial Incarceration

Procedural injustice can occur at any point during the judicial process. However, one of the most researched and documented areas of procedural injustice concerns pre-trial incarceration practices.

One of the most well known studies on procedural justice, and the study most researchers credit for the theory itself, is the award-winning study by Malcolm M. Feeley contained in his book, *The Process is the Punishment*, which received the American Bar Foundation's Silver Gavel Award and the American

Sociology Association's Citation of Merit (1979).<sup>2</sup> In 1992, a second edition of the book was released, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court.* 

All too often, poorer defendants remain incarcerated waiting for trial because they cannot afford bond or attorneys to advocate effectively for their release.<sup>3</sup> This detention occurs prior to a determination of guilt and frequently results in clients losing jobs, homes, the ability to support their families, and sometimes custody of their children.<sup>4</sup>

Malcolm Feeley's study looked at court procedures and process outcomes in New Haven Connecticut's Court of Common Pleas. The study found that pretrial incarceration, particularly for minor offenses, is one of the most egregious factors contributing to the lack of procedural justice in the criminal justice system.<sup>5</sup> The study found that:<sup>6</sup>

- The length of time a defendant spent in jail waiting for trial often exceeded the maximum sentence the defendant would receive if found guilty.
- Pre-trial incarceration effectively punished defendants simply for being poor, rather than being guilty of crimes, and punished the innocent as well as the guilty.
- What predicts the probability of punishment for many defendants in the lower criminal courts is not likelihood of guilt or severity of offense, but simply the degree of poverty.

The study demonstrates that pre-trial incarceration, and the procedural injustice that frequently results from such detention, effectively punishes the defendant for being poor, rather than being guilty of a crime. Moreover, the families of defendants, who are often barely making ends meet, are thrown into financial crises due to the loss of the defendants' financial contributions to the household incomes. Defendants and their families are not the only ones

paying the price for the justice system's lack of pretrial procedural justice. Local and state governments pay a high cost as well. Every time a defendant suffers an unnecessary prolonged pre-trial detention, society incurs the additional social and financial costs of paying for the unemployment benefits, foster care, and social programs that assist the accused and their families during this period of financial crisis. Furthermore, employers also bear a cost in the form of lost employee productivity and disrupted work schedules.

"For every defendant sentenced to a jail term of any length, there are likely to be several others who were released from jail only after and because they pleaded guilty. For each dollar paid out in fines, a defendant is likely to have spent four or five dollars for a bondsman and an attorney. For each dollar they lose in fines, working defendants likely lose several more from docked wages. For every defendant who has lost his job because of a conviction, there are probably five more who have lost their jobs as a result of simply having missed work in order to appear in court. ... When we view criminal sanctioning from this broader, functional perspective, the locus of courtimposed sanctioning shifts dramatically away from adjudication, plea bargaining, and sentencing to the earlier pretrial stages. In essence, the process itself is the punishment.

— Malcolm M. Feeley, The Process is the Punishment: Handling Cases in a Lower Criminal Court (1979)

### Pre-trial Incarceration and the Distortion in the Determination of Guilt

Feeley's study also found that the punitive pre-trial process often seriously distorted the determination of guilt or innocence. For example, incarcerated defendants are typically told they can go home immediately if they plead guilty, while at the same time the serious long-term consequences of a

conviction are often minimized. In addition, the various forms of probation offered by the courts imply that a conviction will disappear if the defendant successfully completes the probationary period, yet in many instances the conviction remains, permanently labeling the defendant as a criminal.<sup>8</sup> The result is that defendants, who cannot afford to miss work or stay incarcerated while awaiting trial, end up pleading guilty to crimes they did not commit, so they can get out of jail in order to save jobs, residences, and care for loved ones. Once again, the *process* punishes defendants who do not have a financial cushion. In addition, it is well recognized that judges impose stiffer sanctions on defendants who are found guilty after a jury trial. A number of empirical studies have compared the disparities in sentencing length between defendants who went to trial and defendants who pled guilty during the pre-trial process. One such study looked at 2,772 cases that resulted in prison terms and, after controlling for offense type, criminal justice status at time of arrest, prior record, attorney type, geographic location, pre-trial status, age, race, and gender, found that sentences following jury trials were 44.5 months longer than those following guilty pleas.10

### Respect for the Justice System, Recidivism, and Public Well-being

Research has also shown that procedural justice, or the lack thereof, can have a profound effect on individual respect for the justice system, crime prevention, and public safety.

Three decades of socio-legal research have demonstrated that citizens value the way decisions are made as much as they value the consequences of those decisions. When people decide the procedures used by legal authorities are fair, they are more likely to accept the outcomes, comply with the rules, and view the authorities responsible for those decisions as legitimate. In addition, socio-legal research has demonstrated there is a clear link between procedural

justice and crime prevention. A number of studies have shown that defendants who are found guilty of crimes were less likely to recidivate when they believed the court process treated them fairly. <sup>13</sup>

The way that rules are enforced is as important as the result of the enforcement activity in terms of building respect for the law.

— Jeremy Travis, Senior Fellow, The Urban Institute, In Thinking About "What Works, What Works Best?"

Research suggests that the public has complex models of procedural justice, often considering eight or more distinct justice issues when deciding the fairness of a legal procedure.<sup>14</sup> The four most important justice issues considered by the public when deciding the fairness of a legal procedure include:<sup>15</sup>

- Voice: Participants value the opportunity to state their cases and give input when decisions are being made. Some research suggests that voice matters even if the opportunity to be heard does not occur until after the relevant decision has been made. However, voice effects are greater if the opportunity to be heard is provided early in the process.<sup>16</sup>
- Neutrality: Procedures must be neutral and the authorities implementing them must be seen as unbiased, honest, and principled. The use of objective criteria is an important means by which a decision-maker can establish his or her neutrality. Moreover, the decisions should be explained to demonstrate that a neutral process was followed.<sup>17</sup>
- Trustworthiness: Participants want to feel that the authorities have considered their needs and concerns and have been honest in their communications with them. Perceived

- trustworthiness is enhanced when the authorities demonstrate they have actually considered the information offered during voice opportunities.<sup>18</sup>
- Respect: Participants want to be treated with dignity and value and have their rights acknowledged. Perceptions of respect are associated with simple politeness, as well as the acknowledgement of the citizen's legal rights.<sup>19</sup>

### Procedural Justice and Respect for Defense Counsel

When procedural justice is lacking and defendants do not feel they have been treated fairly, the result is that the client's perceptions of his attorney, the prosecution, and the system are irreparably harmed, even for clients who ultimately obtain favorable resolutions. The following are some research findings illustrating how clients' perceptions of procedural justice impact their interactions with indigent defense attorneys and the criminal justice system.

- Psychology, interviewed prison inmates in an effort to evaluate the connection between a client's desired participation in the attorney-client relationship, the lawyer's reactions to the client's participation attempts, and the development of client trust in criminal defense attorneys. Inmates in the study who wanted to participate, but were discouraged from doing so by their attorneys, maintained low levels of trust in their counsel. Alternatively, when lawyers allowed their clients to participate, inmates reported higher amounts of trust in those attorneys.<sup>20</sup>
- In 1988, Jonathan Casper and associates reanalyzed data from a study conducted by the National Institute of Law Enforcement and the Administration of Justice of the U.S. Department of Justice. In the study, researchers obtained data from 628 male defendants charged with felonies in three cities: Baltimore, Detroit, and Phoenix. The study measured the importance of procedural

justice to defendants in felony cases by considering factors that appeared to be related to a sense of procedural fairness. One such factor, identified by the participants in the study, was the amount of time spent between the defendant and his attorney talking about the case. The results of the study showed there was a positive correlation between time spent with the lawyer and the client's perception of procedural justice.<sup>21</sup>

#### Procedural Justice and Recidivism

Whether clients feel they have been treated fairly also has an impact on recidivism rates.

- In a 1997 study, researchers gathered information on 479 domestic violence arrestees. The study determined that when police acted in a procedurally fair manner while arresting assault suspects, the rate of subsequent domestic violence was significantly lower than when police exhibited procedural unfairness during arrest. They measured procedural justice by variables such as whether officers took the time to listen to the arrestee's side of the story, and whether the arrestee was handcuffed in front of the victim. 22
- The Safe Return Initiative (SRI) was created by the U.S. Department of Justice's Office on Violence Against Women to confront the myriad challenges facing African Americans as previously incarcerated men reunite with their families. SRI was a multi-state program, initially launched as a partnership between the Institute of Domestic Violence in the African American Community (IDVAAC) and the Vera Institute of Justice in New York. The program works with jurisdictions seeking to reduce domestic violence in the African American community. According to Safe Return's co-director, Mike Bobbitt, mistrust of authorities is a significant program issue. For example, some black women delay reporting a partner's abusive behavior because they do not trust the criminal justice system to treat African American men fairly.<sup>23</sup>

### Notable Approaches, Innovations, and Strategies

To combat procedural injustice, indigent defense agencies have employed a variety of strategies, from initiating pre-trial release programs to seeking legal redress.

### Innovative Pre-Trial Release Programs

To combat the procedural injustice associated with pre-trial detention, indigent defense systems have initiated programs to ensure attorney representation at bail hearings. Some notable approaches include:

- Lawyers and investigators in The Neighborhood Defender Service of Harlem attempt to address pre-trial detention issues early in the process to mitigate the negative consequences associated with client arrests.<sup>24</sup>
- In Minneapolis, the Minnesota Public Defender Office uses certified student attorneys in their third year of law school to argue conditions of release at bond hearings. The students are part of a structured internship program in which they receive training on the standards for pre-trial detention and courtroom advocacy. Students are assigned cases under the supervision of a senior attorney, and their duties include gathering information on the client's background, sustaining client contact with incarcerated defendants, and arguing conditions of release at bail hearings. The internship program has been successful in providing a right to counsel at the bail stage, as well as in engendering client trust and cooperation early in the representation.
- The Lawyers at Bail Project (LAB), Baltimore, MD provides free legal representation at first court appearances for those charged with nonviolent misdemeanors. A study of the project revealed that a lawyer's presence at the court appearance increased the chances that a client

- would be released. LAB clients were released on their own recognizance two and a half times more often than non-LAB clients. In addition, LAB clients reported higher rates of satisfaction with the fairness of the process.<sup>25</sup>
- The University of Maryland School of Law started the Access to Justice and Bail Clinic to provide legal representation to indigent defendants at bail review hearings. In 1998 in Maryland, detainees who lacked representation at bail hearings were typically being incarcerated for 30 to 45 days waiting for their next court date. To resolve the situation, students in the law clinic interview clients in detention facilities and later represent them at bail review hearings. The legal representation provided by the clinic has achieved proven results. 70% of the law student's clients were released on either personal recognizance or by reducing bail to an affordable amount.
- In Massachusetts, public defenders represent the accused for bail purposes in felonies and use a mix of private attorneys and law students to provide legal counsel in misdemeanors cases.
- The Supervised Misdemeanor Release Program (SMRP) in San Francisco, CA is a partnership between the Center on Juvenile and Criminal Justice (CJCJ), a non-profit organization, and the San Francisco Sheriff's Department. The goal is to reduce the number of defendants jailed for misdemeanor failure to appear warrants. First, CJCJ staff screen the jail population for eligible pre-trial misdemeanants. Once participants are identified, CJCJ staff interview them and make recommendations to the court for pre-trial release. After participants are released, program staff follow up with them by providing reminders of court dates and other support until the cases are closed. In 2001, the program supervised 828 releases with an 84% successful court return rate.26

### Measuring Procedural Justice Outcomes and Costs

Services (IDS) initiated the Systems Evaluation
Project to develop data-based system measures to
evaluate the quality and performance of North
Carolina's indigent defense systems on an
ongoing and affordable basis. As with any
taxpayer funded endeavor, justice system
agencies and the courts have to contend with
fixed budgets. When court dockets and indigent
defense agencies become swamped with cases,
the courts, prosecutors, and appointed counsel are
forced to find efficiencies, even when those
efficiencies can sacrifice justice and have longterm consequences and costs to individuals, the
court system, and their host communities.

IDS believes the central question is whether the courts, policymakers, and communities know the full extent of the tradeoffs they are making in terms of justice, state financial costs, and consequences to the social fabric of our communities. The costs of increased recidivism, greater unemployment, unnecessary foster care, and lost productivity to employers are rarely considered by communities and policymakers when decisions about the criminal justice system are made.

IDS's Systems Evaluation Project intends to develop indicators that will measure indigent defense and criminal justice system outcomes. IDS's goal is to include indicators that will quantify criminal justice system outcomes and their costs to our clients and their communities. IDS believes that doing so will enable indigent defense agencies to demonstrate to funders, policymakers, and the public how a high-quality indigent defense system is critical to preserving the fabric of our communities and enhancing public safety.

Information on the project can be found at www.ncids.org.

### Seeking Legal Redress

brought a civil suit for false imprisonment on behalf of a young client who was arrested but not charged. The suit resulted in a small monetary settlement, but more significant to the client was the opportunity to have a conversation with the arresting officer. The client felt humiliated by the officer's actions and the mediation allowed him to express his feelings and regain his dignity.<sup>27</sup>

1 Tom Tyler, What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures, 22 Law & Society Rev. 103, 135 (1988).

2 Brenda Sims Blackwell & Clark D. Cunningham, Taking the Punishment Out of the Process: From Substantive Criminal Justice Through Procedural Justice to Restorative Justice, Law & Contemporary Problems, 2004, at 60.

3 *Id*. at 64.

4 *Id*.

5 *Id*. at 62.

6 Id. at 61.

7 Id. at 62.

8 Id.

9 Michael O'Hear, *Plea Bargaining and Procedural Justice*, Marquette Univ. L. Sch., 2007, at 11.

10 *Id*.

11 Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 Ann. Rev. Law Soc. Sci. 171, 172 (2005).

12 O'Hear, supra note 9, at 13.

13 Raymond Pasternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 Law & Soc'y Rev. 163, 175-76 (1997).

14 O'Hear, supra note 9, at 13.

15 *Id*. at 12.

16 MacCoun, supra note 11, at 192.

17 Tom Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Justice 283, 286 (2003).

18 Id. at 287.

19 Id.

20 Boccaccini et al., Client Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients, 26 Law & Psychol. Rev. 97, 102 (Spring 2002).

21 Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 Law & Soc'y Rev. 483, 498 (1988).

22 Paternoster, supra note 13, at 175-76.

23 Robin Campbell, *Can Perceptions of Fairness Affect Outcomes of Justice?*, 2005 Vera Institute of Justice 3.

24 David C. Anderson, *Public Defenders in the Neighborhood: A Harlem Law Office Stresses Teamwork and Early Investigation*, 1997 National Institute of Justice 5.

25 The Pretrial Release Project: A Study of Maryland's Pretrial Release and Bail System, 2001 Abell Foundation 12-14.

26 http://www.cjcj.org/programs/jail\_services.php.

27 Anderson, supra note 24, at 7.

### Holistic Representation

#### Scenario 1

James, a homeless veteran, sneaks into the light rail depot to sleep during the winter and is arrested for trespassing. He has been cited several times for misdemeanor trespassing offenses and another conviction will enhance this petty offense to a gross misdemeanor. His public defender has handled many of these types of cases and works to get James a case resolution with the least amount of jail time. The prosecuting attorney offers a plea of guilty in exchange for a sentence of time served and a permanent ban from the city's public transportation facilities. James agrees to the plea bargain because he wants to get out of jail and misses drinking with his partners on the street. A month later, James is arrested during the noon hour at a light rail stop for violating the terms of the plea agreement. As a result, the original misdemeanor trespass offense is enhanced to a gross misdemeanor, which carries a presumptive sentence of 120 days in jail.

#### Scenario 2

During the initial interview, James' public defender asks a series of questions from an intake questionnaire. He discovers James is homeless and may have some alcohol abuse issues because James had been drinking heavily the night of the arrest. He probes further by asking James why he keeps sneaking into the light rail depot. James responds that it's a safe place to sleep during the cold winter and the local shelters won't allow him in with his dog. The public defender consults with the in-house social worker and together they decide the best place for James would be a transitional housing facility. The social worker goes online to access a statewide database that lists all of the transitional housing facilities in the area and whether program slots are available. Using the database, she is able to find a program for James. With James' permission, his public defender uses the

referral information provided by the social worker to negotiate a plea bargain that would avoid a conviction, as long as James completes a recovery program at Joshua House. Joshua House is a transitional housing facility for the homeless, which allows pets and requires participants with substance abuse issues to attend weekly AA or NA meetings. The plea agreement also continues to allow James access to the city's public transportation facilities. James is doing well in the program, has found a part time job a few miles from Joshua House, and is on his way to completing the first phase of the program.

#### Issue

After years of witnessing the revolving door of arrest, release, and re-arrest that often characterizes the criminal justice system, indigent defense offices around the country have started to reassess what it means to provide effective representation to their clients.

Traditionally, criminal defense lawyers have focused on the narrow legal issues triggered by a client's contact with law enforcement. Under this traditional model, the lawyer's main focus is to ensure the client does as little jail time as possible. Over the past two decades, many indigent defenders have come to realize this approach fails to address the underlying issues that seem to keep clients tethered to the criminal justice system. Consequently, frustrated by the inability to offer long-term solutions to their clients' problems, indigent defenders have begun to redefine their role as legal counselors.

This reassessment of traditional legal representation led to the development of an expanded model of client representation, called holistic representation. Holistic representation addresses not only the client's specific legal problem, but the client's social, mental health, and other community needs as well.<sup>4</sup>

Under a holistic model of defense representation, attorneys are urged to consider all aspects of the justice system that impact their clients, from procedural justice, collateral consequences, mental health issues, and client-centered representation, to incarceration, reentry, and recidivism. Attorneys are urged not only to understand criminal justice forces but to develop new methodologies and strategies to address them in defense work, such as when crafting legal strategies and negotiating pleas and sentences. Holistic lawyers believe effective counseling means more than competent investigation, trial preparation, or plea-bargaining; it means understanding that the whole client is important, not just the case resolution.<sup>5</sup>

The holistic model of representation has some distinct characteristics:

- Whole-Client Representation: The term refers to client representation from the initial stages of the case to post-release. The representation begins with identifying a client's underlying problems, such as personality disorders, mental illness, addiction, or anger management. Whole-client representation tries to address these problems in order to prevent future breaches of the law and to promote integration back into the community. The primary goal of this type of advocacy is to use the trauma of a criminal arrest to improve a client's life conditions.
- Early Intervention: Holistic advocacy entails an immediate use of investigative resources directed at the integral actors in the particular case. In some instances advocacy begins even before the client is arrested. For instance, the Neighborhood Defender Service of Harlem provides pre-arrest services that include voluntary surrenders and appearing with clients at investigatory line-ups.<sup>7</sup>
- Client-Centered Representation: Client-centered lawyers emphasize giving the client a voice and allowing that voice to shape the scope and nature of the defense strategy. These lawyers attempt to

- meet client expectations by visiting clients in jail, answering questions, returning phone calls, and including the client in strategy development.<sup>8</sup>
- *Interdisciplinary Approach*: The holistic model has led to new methodologies for providing legal representation to clients and new configurations in office staff. Instead of the traditional attorney/investigator model, there is a team model, where the attorney has access not only to investigators but to social workers, mental health specialists, and others who help attorneys craft legal remedies that will address the underlying issues that brought their clients into the legal system and have the best chance of breaking the cycle of recidivism. For example, a social worker can assess a client's mental health status, diagnose a drug addiction, or uncover family violence, which may help convince a judge or prosecutor to offer a disposition other than incarceration.9

The goal is to ensure people are better off when they leave the justice system than when they entered, for their sake and that of society.

—Michael Judge, Los Angeles County
Public Defender

Community-Based: Holistic offices view themselves as part of the larger community. These offices become a resource for the community by forging close relationships with community groups and organizations. These relationships give defender offices an intimate knowledge of the problems faced by community members, including police brutality, racial disparities in the criminal justice system, and intra-community violence.<sup>10</sup>

Redefining the role of counselor changes how a lawyer interacts with the client and the social, legal,

and political roles defenders play within the community and the criminal justice system. <sup>11</sup> Legal counseling in this way requires a lawyer to listen to the client and seriously consider the convergence of the client's legal and non-legal needs in crafting a legal strategy. Social workers and other interdisciplinary experts can help the lawyer identify these issues. <sup>12</sup>

Many holistic lawyers also have realized that the defense perspective needs to be more visible in the policy-making arena. Defenders provide unique insight on how potential legislation could negatively impact their clients, communities, and even government budgets.<sup>13</sup>

Holistic representation encourages indigent defense agencies to engage in community outreach. As a result, many indigent defense agencies now play a more integral role in their communities. Experience in other jurisdictions has demonstrated that even the poorest communities have untapped resources that can assist the overall defense function.<sup>14</sup> While service activities and educational programs are the primary methods that indigent defense agencies use to connect with the population they serve, many offices also further community welfare in a variety of other ways. Some attempt to identify the concerns or problems that pervade particular groups they represent. 15 Others try to prevent government abuse such as police harassment or brutality and work with community members to hold the government accountable. 16 All of these strategies give the community a voice, impact the way the government interacts with them, and build community support for indigent defense.

### Notable Approaches, Innovations, and Strategies

The traditional role of indigent defense offices has been expanded in many indigent defense programs across the country. Some notable programs and initiatives include:

#### On Staff Social Service Teams

- Members of the social service team of the Neighborhood Defender Service of Harlem (NDS) conduct social service needs assessments at case intake during court three days a week. The social service team is led by a licensed social worker, which enables them to identify issues that defense lawyers, prosecutors, and judges are not trained to recognize. <sup>17</sup>
- Other indigent defense offices with licensed social workers on staff include:
  - The Bronx Defenders;
  - Community Law Office, Knoxville, TN;
  - Public Defender Service of Washington, DC;
  - Mecklenburg County Public Defender Office, Charlotte, NC;
  - Connecticut Division of the Public Defender Services; and
  - Public Defender Office of Albemarle County, Charlottesville, VA.

### ■ Integration of Criminal and Civil Practice Areas

The Civil Action Project, the civil practice team of the Bronx Defenders Office, provides comprehensive legal services to Bronx Defenders

Defenders are in a unique position to articulate to the government the concerns of the clients, and to articulate to the clients the concerns of the government, and be a technical advisor to both sides.

— Bob Boruchowitz, Director, King County
Public Defender Association, Seattle,
Washington

clients and their families by fully integrating civil representation with criminal defense practice. The goals are to minimize the unforeseen fallout from the collateral consequences of criminal proceedings and to facilitate client reentry into the community. Their zealous advocacy has helped clients maintain their employment, prevented evictions from subsidized housing, and resulted in improved dispositions in criminal cases. <sup>18</sup>

### Partnering with Non-Lawyers in the Community

The Metropolitan Public Defender Office in Portland, OR, has legal assistants and outreach coordinators from the community on staff to expand the scope of services provided by the office. Outreach coordinators and legal assistants aid public defenders in trial preparation and plea negotiation, and testify at sentencing hearings about effective diversion programs available for clients. Moreover, they augment the offices' community development program by discovering the needs and concerns of community members. An important service provided by these groups is outreach to religious communities. Local churches offer additional support to the office by providing mentors to work with the clients, which judges and court administrators find appealing.<sup>19</sup>

### Problem Solving for Clients and Communities through Anti-Violence Initiatives

The Miami-Dade County Public Defender Office, Miami, FL, has a successful anti-violence initiative (AVI) based on a public health model that incorporates social services and treatment programs into client representation. The initiative involves collaborations with the community to develop diversion programs, sentencing options, and coalitions with other social service organizations to reach better long-term outcomes for clients. Moreover, AVI improves public safety and reduces the number of victims in the community by expanding the problem-solving role of public defenders.<sup>20</sup>

### Recognition of the Effectiveness of the Holistic Approach

At the 2000 National Symposium on Indigent Defense, former Attorney General Janet Reno urged defense service providers to adopt a problem-solver mentality by addressing the underlying issues that cause their clients to commit crimes. She went on to applaud the antiviolence initiative of The Miami-Dade County Public Defender Office for proactively combating violence and recidivism in the community.<sup>21</sup>

### Educational Programs for Clients and Community

- At the Community Law Office in Knoxville, TN, ten attorneys and one investigator teach and mentor at the Boys and Girls Club once a week. Lawyers with the Bronx Defenders tutor students and run the Bronx Defenders Debate Initiative inside the public defender office.
- The community outreach coordinator at the Public Defender Service of Washington, DC schedules Street Law classes in the DC public schools.
- The San Diego Public Defender Office participates in the "Literacy Project," which provides GED or high school equivalency training as part of a client's probation.<sup>22</sup>

#### Group Home for Juvenile Clients

The Fulton County Conflict Defender (FCCD) was a non-profit criminal defense organization that contracted with Fulton County, GA to provide representation to indigent citizens facing felony prosecution. During their existence, the FCCD provided a number of holistic defense services, including starting a group home for their juvenile clients. According to Paul Kehir, the former Executive Director of FCCD, the idea for the juvenile group home developed because attorneys in the juvenile division frequently

complained that their clients were being denied release due to a lack of stable housing. As a result, the FCCD scraped together their resources, bought a building, and started a group home for their juvenile clients who were being denied release because they had nowhere to go.<sup>23</sup>

### Helping Clients Get Back Driver's Licenses

The Washington Defender Association, a membership group of defender offices and assigned counsel, addressed the problem of clients who were repeatedly cited for driving with suspended licenses. The association, in collaboration with other government representatives, developed a plan outside of formal criminal proceedings for drivers charged with driving without a license, for clients to earn back their driver's licenses and seek gainful employment.<sup>24</sup>

### Helping Clients Expunge Criminal Records

- The Kern County Public Defender Office, Kern County, CA, has a program that provides assistance to expunge criminal records of former misdemeanants. The defenders have completed over 600 expungement petitions and the program has been well received by judges and court administrators.
- Public defenders in Sonoma County, CA, run an expungement program designed to help welfare recipients expunge their criminal records or apply for certificates of rehabilitation in order to qualify for jobs.

This program offers employment assistance to clients while fostering positive community relations, which, in turn, raises public support for the defense function in California.<sup>25</sup>

### Lobbying Lawmakers on Justice Issues

Defenders increasingly acknowledge that, to be effective advocates for their clients and their communities, they must engage legislators and other criminal justice policymakers on the issues that affect their clients.

- The Minnesota Board of Public Defense hired a former legislator as its Government Relations Manager. He works closely with a team of defenders who strategize about and then lobby on criminal justice issues during each Minnesota legislative session.
- Defenders in the San Diego Public Defender Office assisted in drafting and actively lobbying for a new law that provides for GED or high school equivalency training as part of probation for their clients.<sup>26</sup>

### Planning and Creating Problem Solving Courts

The San Diego Public Defender Office took the lead in creating the nation's first Homeless Court. The goal was to help resolve criminal justice issues that exacerbated other problems for the homeless. Defenders reach out to the homeless by going into shelters to conduct interviews and then represent them in court proceedings that are held inside the shelters. This program aids court administration and assists people who fear entering the courthouse.<sup>27</sup>

### Addressing Racial Disparities in the Criminal Justice System

The King County Public Defender Office in Seattle, WA organized the Racial Disparity Project, where defense lawyers of color work closely with lawmakers and public policy experts to counter racial and socio-economic disparities in the criminal justice system. The project has focused on three major areas:<sup>28</sup>

- Racial profiling in traffic stops;
- Racial disparity in vehicular impounds as a result of convictions for driving while license suspended; and
- Racial disparity in enforcement of drug laws.

1 Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. Rev. L. & Soc. 123, 127 (2004).

2 Mark H. Moore, *Alternative Strategies For Public Defenders and Assigned Counsel*, 2001 John F. Kennedy Sch. of Gov't. Harv. Univ. 22.

3 Steinberg & Feige, supra note 1, at 125.

4 Cait Clarke, *Problem Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 Geo. J. Legal Ethics 401, 404 (Winter 2001).

5 Id. at 429.

6 *Id*.

7 Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 Fordham Urb. L.J. 1067, 1072 (May 2004).

8 Jonathan E. Gradess, *Public Defense at the Crossroads: Listening to the Voice of Clients*, 2003 Drum Major Inst. for Public Pol'y 6.

9 Steinberg & Feige, supra note 1, at 127.

10 Clarke, supra note 4, at 444.

11 Id.

12 Id. at 430

13 Id. at 440.

14 *Id.* at 446 (the St. Thomas Community Law Center, located in a New Orleans housing project, operates as a charitable organization that works to protect the rights of the residents, combat racism, and bolster community self-determination).

15 Steve Binder, *The Homeless Court Program: Taking the Court to the Streets*, 2002 A.B.A. Commission on Homelessness and Poverty 278 (California public defender Steve Binder interviewed homeless veterans and heard hundreds of veterans describe their fear of going to court to deal with old misdemeanor warrants, which led to the development of homeless court).

16 Tony Fabelo, *What Policymakers Need to Know to Improve Indigent Defense Systems*, 2001 John F. Kennedy Sch. of Gov. and Bureau of Justice Assistance 24.

17 David C. Anderson, *Public Defenders in the Neighborhood: A Harlem Law Office Stresses Teamwork, Early Investigation*, 9 Nat'l Inst. of Justice 7 (1997).

18 McGregor Smyth, *Holistic is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. Tol. L. Rev. 479, 494 (Spring 2005).

19 Clarke, supra note 4, at 431.

20 Bennett H. Brummer, Community Partnerships, Holistic Advocacy through a Public Defender Anti-Violence Initiative, 3 Indigent Def. (NLADA Newsletter, New York, NY) May/June 1999, at 1.

21 Janet Reno, Attorney General, Remarks at the National Symposium on Indigent Defense: Redefining

*Leadership for Equal Justice*, Washington, D.C. (June 29, 2000).

22 Clarke, *supra* note 4, at 448-54.

23 Telephone Interview with Paul Kehir, Former Executive Director, Fulton County Conflict Defender, in Fulton County, Georgia (September 15, 2008).

24 Clarke, supra note 4, at 433.

25 Id. at 446.

26 Id. at 439.

27 Binder, supra note 15, at 278.

28 Clarke, *supra* note 4, at 446.

#### Restorative Justice

#### Scenario 1

K.T., an eighteen-year-old high school graduate, works as a cashier at a grocery store and is awaiting admittance into a local community college. While at work one day, K.T. decides to steal money from the store's cash register and is caught, arrested, and charged with theft. She is appointed a public defender who works to get K.T. a case resolution with the least amount of jail time. The prosecuting attorney offers a plea of guilty in exchange for a sentence of five days in jail, an order to pay restitution, and two years probation. Wanting to put the matter behind her, K.T. accepts the plea bargain. Two weeks later, the admissions department of the local community college discovers the conviction and denies K.T. admission. Since the conviction, K.T. has been unable to get accepted to any college or find permanent employment.

#### Scenario 2

During the initial interview with K.T., the public defender discovers her older brother is in prison, her mother has a drug problem, and K.T. is the primary caretaker of her younger siblings. K.T. also tells the attorney that she stole the money to help pay bills because her mother had recently abandoned the family. The public defender believes K.T. would be an excellent candidate for a restorative justice diversion program. He contacts Sentencing Services to find out what type of programming is available before he begins negotiating with the prosecution. Sentencing Services informs him that K.T. is eligible for a community conferencing program, which leads the public defender to suggest the diversion program during his negotiations with the prosecution. The prosecution agrees to diversion and a representative from Sentencing Services contacts the grocery store management to see if they would be willing to participate in the program. Once the agreement of the parties is obtained, the community conference is held,

which includes K.T., two representatives from the store, K.T.'s attorney, and two facilitators. Eventually, the parties agree to a restoration agreement and, because K.T. has no prior record, the prosecutor agrees to dismiss the case if K.T. successfully complies with the conference agreement.

#### Issue

In most jurisdictions, the conventional criminal justice system is almost entirely offender-based driven. Typically, the system focuses on the violation of the law and the need to hold offenders accountable. Crime is viewed as having been committed against the state. As a result, the actual crime victim is subsidiary to the process and generally has no legal standing in the proceedings. This reality often leaves victims, offenders, and the community dissatisfied with the processes and outcomes of the criminal justice system.

Restorative justice offers a very different way of understanding and responding to crime. Crime is viewed as a breach in the social fabric that needs to heal.<sup>3</sup> Conventional prosecution does not offer an opportunity to heal, since the harms experienced by both the victim and the community are not repaired by simply punishing the perpetrator.<sup>4</sup> Restorative justice is intended to reduce the fear, anger, and alienation experienced by both the victim and the offender. It is grounded in the belief that those most affected by crime should have the opportunity to become actively involved in resolving the conflict. 6 The most succinct definition of this theory of justice is offered by Howard Zehr, considered by many the leading visionary and architect of the restorative justice movement. According to Zehr, restorative justice is "the process to involve those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible."<sup>7</sup>

Zehr notes that restorative justice can be contrasted with conventional criminal justice in four key areas, which are presented in the following table:<sup>8</sup>

Different Views of Justice

Criminal Justice	Restorative Justice
Crime is a violation of the law and the state	Crime is a violation of people and relationships
Violations create guilt	Violations create obligations
Justice requires the state to determine blame (guilt and punishment)	Justice involves victims, offenders, and community members in an effort to put things right
Central Focus: Offenders getting what they deserve	Central Focus: Victim needs and offender responsibility for repairing the harm

Restorative justice lawyers educate clients about restorative justice programs and serve in a supportive capacity if a client admits guilt and decides to participate in such a program.<sup>9</sup>

Defense attorneys can be understandably reluctant for their clients to engage in restorative justice encounters, since it requires an admission of guilt without knowing the probable sentencing consequences. However, in many cases, the benefits to the clients may outweigh these concerns, since offenders who have been incarcerated often find themselves, upon release, homeless, unemployed, shunned by their families, and alienated from their former communities. Restorative justice is an alternative that allows an offender to make reparations for wrong actions, heal relationships, and remain part of the community.

Robert Cochran, a professor at Pepperdine University School of Law, suggests that attorneys have an obligation to discuss restorative justice options with a client. 12 According to Cochran, a client's decision to accept responsibility for his or her actions is an important moral decision offering a means to restore the client to the community.<sup>13</sup> Defense counsel should make clients aware of the restorative justice process and discuss the impact of crime on the community and victims. Cochran further contends, "The lawyer can engage the client in moral discourse, without compromising the ability of the lawyer to serve as an aggressive advocate in other phases of the representation. Moreover, restorative justice often serves the client's interests as well, as the process can lead to redemption, forgiveness, and reconciliation, which may be more important than the ultimate resolution of the criminal charge."14

## Notable Approaches, Innovations and Strategies

Most of the programs highlighted in this section primarily function in the juvenile justice system. This is partly due to the fact that rehabilitation, the prevailing theory in the juvenile justice system, is more conducive to restorative justice principles than the retributive model of punishment used in the majority of systems that process adult offenders. Some notable approaches taken by jurisdictions around the country include:

#### Victim Offender Mediation Programs (VOMPs)

VOMPs involve a meeting between the victim and offender facilitated by a trained mediator. With the assistance of the mediator, the victim and offender begin to resolve the conflict and construct their own approach to achieving justice. Both are given the opportunity to express their feelings and perceptions of the offense, and the meetings usually conclude with an attempt to reach an agreement about the steps the offender will take to repair the harm suffered by the victim. Studies conclude these programs have high client satisfaction rates, victim participation rates, and

restitution completion rates and result in reduced fear among victims and reduced criminal behavior by offenders.<sup>15</sup>

The Institute for Conflict Management, Orange, CA: The Institute is sponsored by the St. Vincent de Paul Society, a church-related and community-based social service agency. Prior to bringing a victim and offender together, a mediator meets separately with each party to listen to his or her story, explain the process, and invite participation. An evaluation found that 99% of the Institute's mediation sessions resulted in successfully negotiated agreements and that 96.8% of these agreements were successfully completed or nearing completion.

#### Conferencing Programs

Conferencing programs are similar to victimoffender mediation programs, in that they involve
the victim and offender in an extended
conversation about the crime and its
consequences. However, conferencing programs
also include the participation of families,
community support groups, police, social welfare
officials, and attorneys. Important to this program
is the concept of "reintegrative shame," whereby
the community denounces the offender's conduct
as unacceptable but affirms their commitment to
the offender and their active desire to reintegrate
him back into society. Conferencing programs
appear to show promising returns in juvenile
corrections; typically, they have:

- Restitution agreements reached in 95% of the cases;
- Restitution completion without police followup in 90% of the cases; and
- Victim satisfaction rates around 90%.

Qualitative studies suggest that conferencing programs may help offenders develop empathy for their victims and improve relationships between the families and the police.<sup>17</sup>

Travis County Neighborhood Conference Committee, Austin, TX: The Travis County Neighborhood Conference Committee is an example of a conferencing program. Committee members are volunteers who live or work within a community. Eligible cases include first-time offenders charged with misdemeanors. The committee separately interviews the youth and his or her parents to gain a better understanding of the family's life and the possible causes of the criminal act. In addition, the committee determines sanctions appropriate for each offense and each family situation. A contract is created and signed by all participants, which facilitates restoration of loss to the neighborhood, restitution to the victim, and reintegration and acceptance of the juvenile into the community after completion of the agreement.<sup>18</sup>

#### Circles

Circles provide a space for an encounter between the victim and the offender, but they move beyond that to involve the community in the decision making process. Depending on the model being used, the community participants may range from justice system personnel to anyone in the community concerned about the crime. The victim, victim's family, offender, offender's family, and community representatives are all given a voice in the proceedings. Participants typically speak as they pass a "talking piece" around the circle. 19

Navaho Peacemaker Court: In 1982, the Navaho Nation created the Navaho Peacemaker Court (NPC), which is a horizontal system of justice that promotes equality, balance, and preservation of relationships. The NPC includes songs, prayers, history, and stories. A peacemaker, who is usually a designated elder or other respected community member, guides the victim, offender, and support community to harmony by persuasion, not coercion.<sup>20</sup>

#### Restitution Programs

Restitution proactively involves the victim and offender in repairing the harm done to the victim. It can embody both monetary payments and in-kind services to the victim, such as house repairs, lawn work, and seasonal chores. When matched with similar offenders processed through the traditional juvenile justice system, the Vermont Juvenile Court Diversion program showed significantly lower recidivism rates when using restitution as an alternative sanction to incarceration or intensive probation. One study reported that when sought as an outcome of the VOMP process, 95% of the mediation meetings resulted in negotiated restitution agreements. Proponents also cite evidence that restitution sanctions can reduce prison populations and reduce recidivism at a higher rate than incarceration.21

The Juvenile Reparation Program (JRP), Elkhart, IN: JRP targets older juveniles who may have previously failed in the juvenile justice system and who risk continuing their negative behavior into adulthood. JRP staff assist the youth in developing a contract, which routinely includes accountability strategies such as restitution to the victim, volunteer service as symbolic restitution to the community, and specific self-improvement strategies. The contract may also include face-to-face mediation with the victim.<sup>22</sup>

#### Community Service Programs

Community service is similar to restitution in that the action taken by the offender is to compensate the loss suffered by the victim. However, restitution repairs the harm to the individual victim, whereas community service repairs the harm to the community. A study done on juveniles in England and Wales showed that participants completed at least 70% of community service orders. The study also found that juveniles considered community service a worthwhile experience without losing sight that they were

- being punished for their criminal acts. Moreover, affected business and community agencies placed a high value on the services provided by the juveniles.<sup>23</sup>
- Crime Repair Crew, Dakota County Community
  Corrections, Dakota County, MN: As a form of
  community service to hold juvenile offenders
  accountable, Dakota County Community
  Corrections established the Crime Repair Crew.
  The crew consists of juvenile nonviolent
  offenders who operate under the direction of a
  trained coordinator. If a victim wishes to
  immediately repair any damage at a property
  crime scene the crew is contacted by police. This
  experience offers juvenile offenders the
  opportunity to give back to the community while
  learning skills in construction and painting.<sup>24</sup>

#### Written and Verbal Apologies to Victims and Other Affected Persons

An apology is a written or verbal communication to the crime victim and the affected community. In the apology the offender accurately describes the criminal behavior and accepts full responsibility for his or her actions. 25 As part of the Restorative Justice Program of the Youth Services Bureau in Forest Lake, MN, juvenile offenders appear before a panel of community volunteers, read letters of apology, list expenses related to their offenses, and hear from community members about how the crimes affected the community. In addition, the offenders develop contracts that include community service projects, attending peer personal-goal groups, writing research papers on offense-related topics, and attending educational programs with their parents regarding their offenses. The program is usually reserved for first-time offenders of minor property crimes, including shoplifting, vandalism, and age-related offenses. Participants are typically 11, 12, or 13 years old.<sup>26</sup>

#### Victim or Community Impact Panels

These panels are forums that offer victims and other community members the opportunity to describe their experiences with crime to offenders. Participants talk with offenders about their feelings and how the crime has affected their lives. Panels may be conducted in the community or in residential facilities and may meet several times to help offenders better understand the full human impact of crime in communities.<sup>27</sup>

- Impact of Crime on Victims Program of the Department of Youth Authority, CA: The goal of the Impact of Crime on Victims Program of the Department of Youth Authority in California is to increase juvenile offenders' understanding of the personal harm caused by crime. Program objectives for youthful offenders are to:
  - Prevent further victimization;
  - Create offender awareness of the impact that crime has on the victim, the family, and the community; and
  - Teach offenders how to make positive decisions.

#### Community or Neighborhood Impact Statements

These statements drafted by community members provide an opportunity for citizens whose lives are affected by crime to inform the court, community reparative board, or offender how crime affects the community's quality of life. Community impact statements have been used in crimes that are commonly thought of as victimless, such as drug offenses.<sup>28</sup>

Reparative Probation Program, VT: Intended for offenders convicted of misdemeanor or nonviolent felony crimes, the Reparative Probation Program (RPP) directly involves community members who meet face to face with offenders to negotiate "reparative agreements" that specify how offenders will make reparation to their victims and other community members. A

judge, using an administrative probation order with the condition that the offender has no further involvement in criminal activity, sentences the offender to the RPP following adjudication of guilt with a suspended sentence. The offender's requirement to complete the program is also a special condition of probation. If the offender fails to satisfy the agreement within the required period, he or she may be returned to the court for further action or continued supervision.<sup>29</sup>

#### **■** Victim Empathy Groups or Classes

A victim empathy class is an educational program designed to teach offenders about the human consequences of crime. Offenders are taught how crime affects the victim and the families, friends, and communities of both victim and offender. A key element of the class is the direct involvement of victims and victim service providers. They tell their personal stories of being victimized or of helping victims to reconstruct their lives after traumatic crimes.<sup>30</sup>

1 Mark S. Umbreit et al., *Restorative Justice in the Twenty First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 Marq. L. Rev. 251, 254 (Winter 2005-2006).

2 *Id*.

3 Brenda Sims Blackwell & Clark D. Cunningham, Taking the Punishment out of the Process: From Substantive Criminal Justice Through Procedural Justice to Restorative Justice, 67 Law & Contemp. Probs., 2004, at 68.

4 *Id*.

5 *Id*.

6 Umbreit et al., *supra* note 1, at 255.

7 Howard Zehr, The Little Book of Restorative Justice 19-20 (Good Books 2002).

8 Id. at 21.

9 Jessica Ashley & Phillip Stevenson, *Implementing Balanced and Restorative Justice: A Guide for Defense Attorneys*, 2006 Illinois Crim. Just. Info. Auth. 12.

10 Blackwell & Cunningham, supra note 3, at 69.

11 Id.

12 Robert F. Cochran, Jr., *The Criminal Defense Attorney: Roadblock or Bridge to Restorative Justice*, 14 J. L. & Religion 211, 215 (1999-2000).

13 Id.

14 *Id*.

15 Restorative Justice Online,

http://www.restorativejustice.org/intro/tutorial/process es/vom (last visited Mar. 31, 2008).

16 Restorative Justice Online,

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17 Restorative Justice Online,

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18 Restorative Justice Online,

http://ojjdp.ncjrs.org/PUBS/implementing/accountabil ity.html (last visited Mar. 31, 2008).

19 Restorative Justice Online,

http://www.restorativejustice.org/intro/tutorial/process es/circles (last visited Mar. 31, 2008).

20 Id.

21 Restorative Justice Online,

http://www.restorativejustice.org/intro/tutorial/outcom es/restitution (last visited Mar. 31, 2008).

22 Restorative Justice Online,

http://www.restorativejustice.org/intro/tutorial/outcomes/reparation (last visited Mar. 31, 2008).

23 Restorative Justice Online,

http://www.restorativejustice.org/intro/tutorial/outcomes/communityserv (last visited Mar. 31, 2008).

24 Id.

25 Guide for Implementing the Balanced and Restorative Justice Model,

http://ojjdp.ncjrs.org/PUBS/implementing (last visited Mar. 31, 2008).

26 Id.

27 Id.

28 Id.

29 *Id*.

30 Id.

## Part II: The Changing Practice of Indigent Defense

Changes and shifts in our nation's social policies have had an immense impact on the criminal justice system and on indigent defense. It is imperative that indigent defenders understand how these changes affect their clients and the new challenges they face in providing quality representation. The sections in Part II highlight the new challenges facing indigent defense practitioners as well as the innovative solutions indigent defenders have devised.

- 1. Emerging Issues That Are Changing the Way Attorneys Prepare Cases
- 2. Serving the Client More Effectively
- 3. Using the Court System to Improve Client Outcomes
- 4. Building Support for Indigent Defense in the Community
- 5. Tools for Better Office Management

# Part II.1: Emerging Issues That Are Changing the Way Attorneys Prepare Cases

A more risk averse society, decades of tough on crime policies, and advances in technology have combined to change the landscape indigent defense clients face. This section highlights the changed consequences of a criminal conviction and the ways defense attorneys have responded to mitigate these consequences.

- A. Collateral Consequences of Criminal Convictions
- B. Reentry
- C. Incarceration Issues
- D. Expungement

## Collateral Consequences of Criminal Convictions

#### Scenario 1

Howard B. came to the United States from Jamaica when he was six. He attended school here, married an American citizen, and had two children. Believing he had gained citizenship through his marriage, Howard never became a naturalized citizen. Last year, Howard was arrested for selling a small amount of marijuana to an undercover officer. When he was seized by police, he had no marijuana or money in his possession. At his arraignment, about 20 hours after his arrest, Howard was offered a plea of guilty in exchange for a sentence of time served. Wanting to put the matter behind him and not wanting to risk missing days at work, Howard accepted the plea bargain, even though he had a good case. Within a few months, Howard was placed into immigration custody and deported to Jamaica, a country he has not lived in since early childhood.

#### Scenario 2

Fortunately, before Howard accepts the plea bargain, his defense attorney conducts a thorough initial interview and becomes aware of Howard's immigration status and the potential immigration consequences that could result from the plea. He advises Howard that he could be deported if he accepts the plea bargain. Then the attorney uses the knowledge of Howard's immigration status and the collateral consequence of deportation to persuade the prosecution not to proceed with the case. As a result, Howard remains in the country with his family and is in the process of becoming a naturalized citizen.

#### Issue

In criminal cases, there can be both direct and indirect consequences of a conviction. The direct consequences of a criminal conviction are imposed by the criminal court and may include jail or prison sentences, parole eligibility, and the imposition of fines and requirements. In contrast, indirect or "collateral" consequences of a criminal conviction are civil penalties imposed by the government or government agencies, licensing boards, or other civil entities as the result of a criminal arrest or conviction. Collateral consequences can include the loss of professional licenses or student loans, deportation, and the denial of public benefits, to name just a few. Because collateral consequences are not imposed by the criminal justice system, they are not considered part of the criminal punishment. As a result, collateral consequences do not have to be addressed in criminal court, even though they result from criminal arrest or conviction.

Generally, there are two types of collateral consequences:

- Automatic Collateral Sanctions: Legal penalties imposed automatically after a conviction for a felony, misdemeanor, or other offense.<sup>6</sup>
- Discretionary Disqualifications: Penalties that a civil court, administrative agency, or other official is authorized to impose on a person convicted of an offense on grounds related to the conviction.<sup>7</sup>

#### Growing Concern about Collateral Consequences

Over the past decade, indigent defense attorneys have become increasingly concerned about collateral consequences for a number of reasons:

Collateral Consequences are Difficult to Identify:
Collateral consequences have been promulgated with little coordination in disparate sections of State and Federal codes. In addition, federal and state governments are currently not required to collate the various collateral consequences into a centralized resource. Therefore, it is difficult for criminal defense attorneys, prosecutors, and judges to identify the collateral consequences relating to a defendant's criminal conviction.<sup>8</sup>

- Collateral Consequences are Not Focused on in the Criminal Justice Process: Institutional actors like judges, prosecutors, and defense attorneys are often unaware of the panoply of collateral consequences that attach to a criminal conviction. Since collateral consequences can be lifelong and often more severe than the criminal penalty itself, this systemic lack of awareness can result in harsher penalties than the prosecution or the courts may desire. 10 Moreover, the exclusion of collateral consequences from the criminal process is unfair to criminal defendants because they are unaware of all the ramifications that may result from their criminal arrests, guilty pleas, or convictions.<sup>11</sup> Given the practical difficulties of identifying collateral consequences, it is not surprising that the majority of Federal and State courts have held that an attorney need not explain collateral consequences in order to satisfy a client's Sixth Amendment right to effective assistance of counsel.12
- Exponential Growth in the Number, Variety, and Severity of Collateral Consequences: In response to the "get tough on crime," "war on drugs," and "war on terrorism" movements, the number and severity of federal and state laws imposing collateral consequences have increased steadily over the past twenty years.<sup>13</sup>
- Technological Advances: The advent of the Internet, advances in database technology, and decreases in technology costs have made the growth in collateral consequences possible, because it is now possible for agencies to easily exchange information and cross-reference data.
- A More Risk Adverse Society: An increasingly litigious society and the potential civil liability associated with hiring or renting to ex-offenders has made State agencies, employers, and landlords wary of potential litigation. This has led to persons with criminal records, even if there were no criminal convictions, being routinely disqualified

- from employment and housing opportunities.<sup>14</sup> The increased fear of lawsuits, coupled with the technological advances that have led to increased public access to criminal record information, has made the impact of collateral consequences over the last decade even more severe.
- Removal of Geographical Barriers: Improved technology and increased cooperation between government agencies have removed many of the geographical barriers that once existed between government agencies from state to state.

  Practically speaking, this means that individuals, who once were able to move to a new state or region in order to "start over," now find that their criminal records follow them wherever they go.

From the moment of arrest, people are in danger of losing hard-earned jobs, stable housing, basic public benefits, and even their right to live in this country. . . . The steady accretion of collateral sanctions has combined with the exponential increase in the availability of criminal record data to create a "perfect storm."

- The Bronx Defenders, Defender Toolkit: Using Knowledge of Collateral Consequences to Get Better Results in the Criminal Case.
- Barriers to the Reentry of Former Clients:

  Collateral consequences raise significant and sometimes insurmountable barriers to the successful reintegration of ex-offenders into society, thereby exacerbating the probability for recidivism. For example, ex-offenders can find that their criminal record histories act as significant barriers to finding employment, which makes the likelihood that they will reoffend higher. Higher recidivism rates lead to increased

costs for indigent defense systems, law enforcement, and the criminal justice system, as well as decreased public safety.

#### Improving the Quality of Justice

Many criminal justice scholars and criminal defense attorneys believe the criminal justice system would dispense a higher quality of justice if defendants, defense attorneys, prosecutors, and judges became aware of the civil consequences of criminal convictions. <sup>16</sup> The experiences of indigent defenders in New York, Washington, DC, and the State of Washington have shown that educating clients, prosecutors, and judges on the collateral consequences of convictions results in more favorable plea and sentencing dispositions, and, in some cases, even dismissals. <sup>17</sup>

#### Collateral Consequences and Defense Counsel

Because of collateral consequences' severe, longterm, and sometimes permanent impact on clients, defense counsel in criminal matters need to be aware of these consequences when they formulate defense strategies, especially when they are negotiating pleas. 18 But to do so, defense counsel would need major assistance at a system level. Given the complexity, proliferation, and lack of coordination in the imposition of collateral consequences, it is inefficient, impractical, costly, and a duplication of effort to expect each criminal defense attorney to identify collateral consequences on his or her own. In response, a number of indigent defense systems around the United States have developed a variety of tools or resources to help criminal defense attorneys incorporate advice about collateral consequences into their standard practice.<sup>19</sup>

#### Collateral Consequences and Other Criminal Justice System Actors

Indigent defense attorneys are not the only system actors who are concerned about collateral

consequences and their impact on clients and communities. District attorneys, judges, and the Department of Justice have become concerned about the lack of coordination and knowledge in the criminal courts regarding collateral consequences as well.

In 2001, as President of the National District Attorneys' Association, Robert M.A. Johnson recommended that prosecutors consider collateral consequences during charging and plea negotiations. <sup>20</sup> Mr. Johnson contended that prosecutors must comprehend the full range of consequences that flow from a conviction. Mr. Johnson went on to state, "if not, we will suffer the disrespect and lose the confidence of the very society we seek to protect."<sup>21</sup>

Experience has taught that defenders can be successful at leveraging more favorable bail, plea, and sentencing results – or even outright dismissals – when they are able to educate prosecutors and judges on the draconian consequences for the clients and their families.

— The Bronx Defenders, Defender Toolkit:

Using Knowledge of Collateral
Consequences to Get Better Results in the
Criminal Case.

In May 2005, the Chief Judge of the State of New York, the Honorable Judith S. Kaye, organized the Partners in Justice Colloquium. This effort brought together judges, practitioners, and academics to promote a better understanding of the collateral consequences of criminal prosecutions in New York. This group, in partnership with the Lawyering in the Digital Age Clinic at Columbia University School of Law, developed a website that details the collateral consequences of conviction in six areas (www2.law.columbia.edu/fourcs/).<sup>22</sup>

In 2007, the U.S. Congress passed the Court Security Improvement Act of 2007, which directs the Department of Justice (DOJ) to develop a comprehensive compilation of federal and state collateral consequences. The DOJ has appointed the National Institute of Justice (NIJ) to begin work on the project, and they have solicited proposals to conduct a national study.<sup>23</sup>

## Notable Approaches, Innovations, and Strategies

#### ■ The Development of Standards for Handling Collateral Consequences

National, statewide, and local indigent defense systems and agencies have responded by developing internal rules or guidelines for dealing with collateral consequences at a system level.

ABA Standards: In 2004, the American Bar Association (ABA) adopted standards regarding the treatment of collateral consequences by indigent defense systems, Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons (hereinafter ABA Standards).<sup>24</sup>

The ABA Standards urge jurisdictions to:<sup>25</sup>

- Assemble and codify their respective collateral consequences in a single chapter or section of the criminal code;
- Implement mechanisms to inform defendants of these consequences as part of the guilty plea and sentencing processes;
- Require courts to consider these consequences when imposing sentences; and
- 4. Narrow the range of consequences.

Criminal code sections should identify the type, severity, and duration of the consequences applicable to each offense.<sup>26</sup>

#### Statutory Reform and Case Law

A number of states have passed new legislation regarding collateral consequences.

- Minnesota: In 2007, Minnesota became the first state to codify all of the collateral sanctions of criminal offenses in Minnesota into a single chapter in their statutory code.<sup>27</sup>
- Oregon and New Mexico: The Oregon Court of Appeals and the New Mexico Supreme Court have held that an attorney has an affirmative duty to advise a client of immigration consequences, and that failure to do so constitutes ineffective assistance of counsel.<sup>28</sup>
- Florida, Georgia, and North Carolina: Overall, as many as two dozen jurisdictions provide by court rule or statute that defendants must be advised of the possibility of deportation when pleading guilty, including the southern states of Florida, Georgia, and North Carolina.<sup>29</sup>
- Uniform Act on Collateral Consequences of Conviction (UACCC): The National Conference of Commissioners on Uniform State Laws (NCCUSL), now 117 years old, is a non-profit unincorporated association that provides states with model legislation that brings clarity and stability to critical areas of the law. Commissioners include lawyer-legislators, attorneys in private practice, state and federal judges, law professors, and legislative staff attorneys who have been appointed by State governments to research, draft, and promote enactment of uniform state laws in areas where uniformity is desirable and practical. The UACCC is in the draft stages of developing an act that proposes:
  - 1. Collateral consequences be collected in a single document;
  - 2. The existence of the consequences be made known to the defendant at critical stages in the process;

- The judgments that count as convictions for purpose of imposing collateral sanctions be clearly defined;
- 4. The consequences applicable to employment, educational benefits, housing and licensing be limited;
- 5. The consequences be imposed only by decision of the legislature, if at all, prohibiting creation of sanctions by ordinance, policy, or rule, unless authorized by statute;
- The person previously incarcerated be offered a relief mechanism, such as a Certificate of Good Conduct; and
- 7. The person released from prison should have the right to vote.<sup>30</sup>
- Federal and State Courts: A number of Federal and State courts have distinguished between an attorney providing no advice and providing the wrong advice regarding collateral consequences. In the latter instance, several courts have held that misinforming a defendant of potential collateral consequences constitutes ineffective assistance of counsel.<sup>31</sup>

#### Developing System Resources

- Practitioners, advocates, and law student volunteers in a number of jurisdictions, including Minnesota, Washington, DC, New York City, New Jersey, and Ohio, have developed resource guides for criminal defense attorneys. These resource guides identify collateral consequences attached to criminal charges and convictions in their states. 32
- Bronx Defenders, Bronx, NY: The Bronx Defenders have developed an online resource guide that walks criminal defense attorneys

- through the steps of incorporating collateral consequences into defense strategies on pre-trial release, client advisement, and plea and sentencing negotiations (<a href="www.reentry.net/ny/">www.reentry.net/ny/</a>).33
- Office of Indigent Defense Services (IDS), NC: IDS in partnership with the University of North Carolina School of Government, has published and posted online a compendium on immigration collateral consequences, Immigration Consequences Manual, and is currently working on collecting collateral consequences relating to housing, public assistance, education, and other areas, which it plans to translate into an online, searchable database on the Internet.
- b U.S. Congress: In 2007, the U.S. Congress passed the Court Security Improvement Act of 2007, which directs the Department of Justice (DOJ) to develop a comprehensive compilation of Federal and State collateral consequences. The DOJ has appointed the National Institute of Justice (NIJ) to begin work on the project and they have solicited proposals to conduct a national study.<sup>34</sup>
- Legal Action Center (LAC): LAC is a non-profit law and policy organization based in New York and Washington, DC whose sole mission is to fight discrimination against people with histories of addiction, HIV/AIDS, or criminal records, and to advocate for sound public policies in these areas. LAC created a State-by-State Report Card that details the legal barriers each state imposes in the areas of employment, housing, benefits, voting, access to criminal records, parenting, and driving. This report card ranks each state on whether its laws and policies help or hurt those seeking reentry. North Carolina is ranked 32<sup>nd</sup>. 35
- The Sentencing Project, Washington, DC, State-By-State Resource Guide: The Sentencing Project is a national organization that was founded in 1986 to provide defense lawyers with sentencing advocacy training and to reduce the

reliance on incarceration. Since that time, The Sentencing Project has become a leader in the effort to bring national attention to disturbing trends and inequities in the criminal justice system with a successful formula that includes the publication of groundbreaking research, aggressive media campaigns, and strategic advocacy for policy reform. Recently, The Sentencing Project developed a website (www.sentencingproject.org) dedicated to providing information and new developments around the topic of collateral consequences. The website includes a State-by-State Resource Guide, which describes the laws and practices for each jurisdiction relating to restoration of rights and obtaining relief from collateral consequences.36

#### Web-based Databases on Collateral Consequences

A number of indigent defense agencies and organizations across the country are developing web-based databases on collateral consequences to publish on the Internet.

- The Council on Crime and Justice (CCJ): CCJ is a non-profit organization in Minnesota that is developing a web-based database for New York, Colorado, and the state of Washington that links statutory collateral sanctions to the triggering criminal offenses.<sup>37</sup>
- California Public Defender Offices: Various counties in California have purchased CrimeTime, which is software for computers and PDAs that guides prosecutors and defense attorneys through the collateral consequences attached to specific criminal charges.
- The Legal Action Center, Washington, DC & NY:
  The Legal Action Center, a non-profit based in
  Washington, DC and New York, provides legal
  assistance to people with criminal records who

- suffer from discrimination associated with collateral consequences.<sup>38</sup>
- Columbia University School of Law: In February 2007, the Lawyering in the Digital Age Clinic at Columbia University School of Law created a web tool, the 4C's Calculator: Collateral Consequences of Criminal Charges (ccnmtl.columbia.edu/portfolio/law/collateral consequen.html). This tool helps legal practitioners quickly and easily compare the collateral consequences of criminal charges across a variety of legal areas. The 4Cs Calculator serves multiple purposes:<sup>39</sup>
  - Lawyers can better counsel their clients;
  - Judges can assure appropriate sentencing; and
  - Public policy researchers can use it as a lens through which to examine the matrix of the New York State legal system.

#### New Models of Indigent Defense Systems

Some indigent systems in the country have gone beyond developing resources and tools to actually changing the way they process criminal cases.

Defender has developed a cost-effective defense model that addresses collateral consequences on a system level. They have developed a team approach to processing criminal cases. The Bronx Defender obtained outside resources in order to fund a civil practice team within their office. The Civil Action Project (CAP), as the team is called, works to identify the collateral consequences in New York that attach to arrests and misdemeanor and felony convictions. CAP civil attorneys then train Bronx Defender criminal defense attorneys on the consequences and develop strategies for incorporating the consequences into plea negotiations with prosecutors. The average cost

per case for the Bronx Defender office, including these additional services, was approximately \$322 in 2006. 40 The Bronx Defenders developed a simple 4-question screening process for their defenders to use in identifying potential collateral consequences. Bronx Defenders ask clients at the initial interview if they:

- 1. Have or hope to have any student loans;
- 2. Live in public housing;
- 3. Receive any public benefits; and
- 4. Have any child dependants.

#### Criminal Justice System Partner Activities

Indigent defense is not the only actor in the criminal justice system that has become more concerned about the lack of coordination and knowledge in the criminal courts regarding collateral consequences.

- Increased Concern by District Attorneys: In 2001, as President of the National District Attorneys' Association, Robert M.A. Johnson recommended that prosecutors consider collateral consequences during charging and plea negotiations. Mr. Johnson contended that prosecutors must comprehend the full range of consequences that flow from a conviction. 41
- Increased Concern by Judges: In May 2005,
  Chief Judge of the State of New York, the
  Honorable Judith S. Kaye, organized the Partners
  in Justice Colloquium. This effort brought
  together judges, practitioners, and academics to
  promote a better understanding of the collateral
  consequences of criminal prosecutions in New
  York. This group, in partnership with the
  Lawyering in the Digital Age Clinic at Columbia
  University School of Law, developed a website,
  www2.law.columbia.edu/fourcs/, which details
  the collateral consequences of conviction in six
  areas. 42

1 Michael Pinard, An Integrated Perspective On the Collateral Consequences of Criminal Convictions and Reentry Issues Faced By Formerly Incarcerated Individuals, 86 B.U.L. Rev. 623, 634 (2006).

2 Id. at 635.

3 *Id*.

4 Id. at 639.

5 *Id*.

6 A.B.A. Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons: Black Letter With Commentary, 36 U. Tol. L. Rev. 441, 446 (2005) (hereinafter ABA Standards on Collateral Sanctions).

7 *Id*.

8 Id. at 450.

9 Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-offender Reentry*, 45 B.C.L. Rev. 255, 273 (2004).

10 *Id.* at 273-74 (Robert M. A. Johnson, the past president of the National District Attorney's Association has suggested that "[at] times, the collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without disproportionate collateral consequences").

11 Robert H. Gorman, *Collateral Sanctions in Practice in Ohio*, 36 U. Tol. L. Rev. 469, 475 (2005) (observing that defendants are often unaware of the collateral consequences, which may be more severe than judge-imposed sanctions).

12 Gabriel J. Chin & Richard W. Holmes, Jr., Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 699 (2002) (observing that the vast majority of federal circuits, the majority of states, and the District of Columbia have held that lawyers need not explain collateral consequences).

13 Nora V. Demleitner, *Preventing Internal Exile:* The Need for Restrictions on Collateral Sentencing Consequences, 11 Stan. L. & Pol'y Rev. 153, 155 (1999).

14 Corinne A. Carey, *No Second Chance: People With Criminal Records Denied Access To Public Housing*, 36 U. Tol. L. Rev. 545, 553 (2005) (increasingly, private landlords are following the lead of public housing and screening people for criminal histories); *see generally* James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. St. Thomas L. Rev. 387 (2006).

15 ABA Standards on Collateral Sanctions, *supra* note 6, at 445.

16 See generally McGregor Smyth, Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments As An Advocacy Strategy, 36 U. Tol. L. Rev. 479 (Spring 2005).

17 Id. at 487.

18 Chin & Holmes, *supra* note 12, at 715 (noting that no intelligent plea decision can be made by either the lawyer or client without full understanding of the possible collateral consequences of a conviction).

19 See generally Civil Action Project, The Bronx Defenders, The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys and Other Advocates for Persons with Criminal Records; Cmty. Re-entry Program, Pub. Defender Serv. for the District of Columbia,

Collateral Consequences of Criminal Convictions in
the District of Columbia: A Guide for Criminal

Defense Lawyers; Nancy Fishman, New Jersey
Institute for Social Justice, Briefing Paper: Legal

Barriers to Prisoner Reentry in New Jersey; Reentry
of Ex-offenders Clinic, University of Maryland
School of Law, A Report on the Collateral

Consequences of Criminal Convictions in Maryland;
Wash. Defender Ass'n, Beyond the Conviction: What
Defense Attorneys in Washington State Need to Know
about Collateral and Other Non-Confinement
Consequences of Criminal Convictions; Kimberly R.
Mossoney & Cara A. Roecker, Ohio Collateral
Consequences Project, 36 U. Tol. L. Rev. 611 (2005).

20 Robert M.A. Johnson, *Collateral Consequences*, 16 Crim. Just. 32 (Fall 2001).

21 *Id*.

22 http://www2.law.columbia.edu/fourcs/index.html.

23 Court Security Improvement Act of 2007, 18 U.S.C. §§ 101-501 (2007).

24 See generally ABA Standards on Collateral Sanctions, *supra* note 6.

25 Id. at 442-60.

26 Id. at 450

27 Minn. Stat. ch. 609B (2007).

28 Gonzalez v. State, 83 P.3d 921 (Or. Ct. App. 2004); Paredez v. State, 101 P 3d 799 (N.M. 2004) (involving successful ineffective assistance of counsel claims stemming from counsel's failure to adequately warn of collateral deportation consequences).

29 *See* U.S. Dist. Ct. Dist. of Colo. Local Rules § 3, App. K (form guilty plea notification requiring

acknowledgment of possible deportation); Az. R. Crim P. 17.2(f); Cal. Pen. Code § 1016(5); Ct. Gen. Stat. Ann. § 54-1j; D.C. Stat. § 16-713(a); Fla. R. Crim. P. 3.170(C)(8); Ga. Code Ann. § 17-7-93(c); Haw. Rev. Stat. § 802E-1 through E-3; 725 Ill. Comp. Stat. 5/113-8; Iowa R. Crim. P. 2.8(2)(b)(3); Me. R. Crim. P. 11(b)(5); Md. R. 4-242(e); Ma. Gen. L. Ann. 278 § 29D; Ma. R. Crim P. 12(c)(3)(C); Minn. R. Crim. P. 15.01(10)(d); Mont. Code Ann. § 46-12-210(1)(f); Neb. Rev. Stat. § 29-1819.02(1); N.J. Dir. 12-03 (plea form promulgated pursuant to N.J. R. Crim. P. 3-9); N.Y. Crim. Proc. L. § 220.50(7); N.C. Gen. Stat. § 15A-1022(a)(7); Oh. Rev. Code § 2943.031(A); Or. Rev. Stat. § 135.385(d); R.I. Gen. L. § 12-12-22; Tex. Code Crim. P. Art. 26.13(a)(4); Wash. Rev. Code § 10.40.200(2); Wisc. Stat. Ann. § 971.08(1)(c).

30 Unif. Act on Collateral Consequences of Conviction (November 2007 draft for approval) (hereinafter Uniform Act on Collateral Consequences, U.A.C.C.C.).

31 See, e.g., United States v. Cuoto, 311 F.3d 179, 188 (2d Cir. 2002) (holding that affirmative misrepresentation "meets the first prong of the Strickland test"); Roberti v. State, 782 So.2d 919, 920 (Fla. Dist. Ct. App. 2001) ("Affirmative misadvice about even a collateral consequence of a plea constitutes ineffective assistance of counsel and provides a basis on which to withdraw the plea."); People v. Becker, 800 N.Y.S.2d 499, 505 (N.Y. Crim. Ct. 2005) (holding that misadvice on potential loss of housing constitutes deficient representation); Gonzalez v. State, 83 P.3d at 925 (upholding ineffective assistance claim where defense counsel misinformed the defendant by stating that pleading guilty "may" lead to deportation, given that "the current immigration scheme all but requires that aliens convicted of aggravated felonies be deported").

32 See generally, supra note 19.

33 http://www.reentry.net/ny.

34 18 U.S.C. §§ 101-501 (2006).

35 http://www.lac.org/lac/index.php.

36 http://www.sentencingproject.org/IssueAreaHome.aspx?IssueID=7.

37 http://www.crimeandjustice.org/index.cfm.

38 http://www.lac.org/full\_project.html.

39 http://ccnmtl.columbia.edu/portfolio/law/collateral\_consequen.html.

40 Telephone Interview with Robin Steinberg, Executive Director Bronx Defenders, in Bronx, N.Y. (Feb. 11, 2008).

41 Johnson, supra note 20, at 32.

42 http://www2.law.columbia.edu/fourcs/index.html.

#### Reentry

#### Scenario 1

Juan R. is disabled and lives in public housing with his girlfriend and young son. Since a car accident in 2004, Juan has developed a burgeoning drug habit and was recently arrested for possession of crack cocaine after drugs were found in the family's housing unit. Juan's court appointed attorney has handled a lot of drug cases and advises him of the potential outcomes. He negotiates a plea bargain that results in Juan spending 60 days in jail with three years probation. Wanting to take responsibility for his actions and fearing the harsher punishment that could result from a trial, Juan accepts the plea bargain. Within a few weeks the local public housing authority initiates eviction proceedings against Juan's family. Ultimately, Juan's wife and son are evicted from their housing unit and are now struggling to find a place where the entire family can live. Since Juan completed the jail sentence his behavior has continued to be erratic. The county jail did not offer any programs to address his chemical dependency, and Juan is at risk of violating the terms of probation. The family's transient lifestyle has exacerbated his chemical dependency and makes it difficult for him to make appointments with his probation officer.

#### Scenario 2

After the court appointed counsel learns that Juan's family lives in public housing, he advises Juan that his family could be evicted because of his actions. Juan is devastated; he knew his drug use was getting out of control, but he did not know how to stop. He agrees to do whatever he has to do to make sure his family maintains stable housing. With Juan's permission, his court appointed counsel negotiates a plea bargain that requires Juan to be admitted to a residential substance abuse treatment center after the 60-day jail sentence. The defense counsel also calls a contact at the local housing authority, explains Juan's situation, and requests that no eviction proceedings be brought

against the family. The representative from the housing authority agrees not to pursue eviction proceedings as long as mandatory drug treatment is part of the case disposition. Juan completes the jail sentence and is confronting his chemical dependency. He receives visits from his family on the weekends and, as long as he completes the treatment program, the housing authority has agreed to let him move back in with his family. Even after the criminal case is closed, the court appointed attorney continues to help Juan secure partial funding for college and find a part-time job after Juan completes the drug treatment program.

#### Issue

Reentry refers to the issues related to the transition of offenders from incarceration to society. Each year approximately 650,000 individuals are released from Federal and state prisons. In North Carolina last year, approximately 28,000 individuals were released from prison, while another 118,000 were either on probation or parole. According to the U.S. Department of Justice, two out of three former offenders will be re-arrested for new crimes within three years of their release, and more than half will be re-incarcerated.

This revolving door of arrest and incarceration compromises public safety, drains state resources, and places a tremendous strain on the criminal justice system, including indigent defense systems. National, state, and local policies impacting criminal offenders have created considerable hurdles to reentry, which are helping to drive offenders to recidivate. As a result, various system actors are reevaluating their roles in facilitating the successful reentry of former offenders. As an initial step, system actors are identifying the various points of contact an offender has with the criminal justice system.<sup>5</sup> Each point of contact represents an opportunity for reentry intervention. Obviously, the defense attorney is one major point of contact with considerable potential.

A growing number of defense attorneys are finding they can mitigate some of the hurdles offenders will face upon reentry, and thereby reduce recidivism and defender caseloads, by addressing reentry issues within defense practices. They believe incorporating reentry issues into criminal defense strategy is necessary *as soon as* the lawyer is appointed to the case and have developed new strategies to help defense attorneys integrate reentry concerns into pretrial release arguments and plea and sentencing negotiations.

#### **Understanding Barriers to Reentry**

Prior to engaging in reentry interventions, actors in the criminal justice system must be cognizant of the most pressing problems faced by ex-offenders as they transition back into society. Some of the most notable difficulties include:

- Loss of Drivers' License: In 1992, Congress passed a law withholding ten percent of certain highway funds unless a state enacted a law revoking or suspending the driver's license of anyone convicted of a drug offense. States can opt out of the law, limit it to drug convictions related to driving, or impose a longer revocation or suspension period. Restricting the ability to drive makes it harder and, in areas without effective public transportation systems, virtually impossible for ex-offenders to be employed, participate in addiction treatment or healthcare, and get education or job training. North Carolina revokes drivers' licenses for driving while impaired by alcohol or other substances for one year for the first conviction, four years for a subsequent offense within three years, and permanently for two or more previous offenses when the most recent offense occurred within the past five years.6
- Lack of Access to Mental Health Services: In many jurisdictions, there is little collaboration between corrections and community mental

Civil legal aid attorneys and public defenders who undertake representation of the indigent have a responsibility to be aware of the many challenges their clients face as they make the transition back in to their communities. Without assistance from civil legal aid attorneys and public defenders equipped to handle the legal hurdles of reentry, many ex-offenders fall prey to recidivism, ending up on the docket of the same public defender who helped them on the very offense for which they were originally incarcerated.

— Cynthia Works, Reentry—the Tie That Binds Civil Legal Aid Attorneys and Public Defenders (2003)

health officials. Often, individuals are released from incarceration with a two-week supply of medication and without a referral to community mental health services. Without adequate planning to transition individuals with mental illnesses back into the community, many exoffenders with mental health issues will quickly return to jail or prison. Recidivism rates for individuals with mental illnesses can reach over 70% in some jurisdictions. In North Carolina, more than one in ten, or 13.2%, of state inmates receive mental health counseling, and 10.2% take psychotropic medications.

Lack of Access to Substance Abuse Treatment:
Eighty percent of inmates in state prisons report
histories of drug or alcohol use. Moreover,
substance abuse is one of the major factors that
leads former offenders to recidivate. However,
fewer prisoners are receiving drug treatment today
than in the past. In 1991, 25% of state prison
inmates received treatment in a residential facility

- or by a professional counselor. By 1997, only 10% of inmates were receiving such treatment.<sup>8</sup>
- Disqualification for Occupational Licensing:

  Employers and occupational licensing agencies in most states can ask about and consider criminal convictions, and even arrests that never led to a conviction, in making employment decisions. In many jurisdictions, former offenders are barred from obtaining occupational licensing in a number of areas, including cosmetology, real estate, auto repair, and home health care. In North Carolina, applicants convicted of relevant offenses, including drug-related offenses, may be disqualified from home health care employment.
- Lack of Centralized Transitional Planning: The shift from indeterminate to determinate sentencing has sharply curtailed the function of parole boards, whose job it was to ensure that each prisoner had a tailored release plan (i.e., a place to live, a job or job prospects, and a family ready to accept them). In 1990, 39% of U.S. prisoners were released by parole board decisions. By 1998, this number had dropped to 26%. Moreover, in 1998, 40% of prisoners were released without transition plans in place, up from 29% in 1990.<sup>11</sup> As a result, more and more parolees are being released without viable release plans, which raises their chances of reoffending.<sup>12</sup> In North Carolina, determinate, or structured, sentencing eliminated parole as it previously existed for all felony and misdemeanor crimes (except Driving While Impaired) committed on or after October 1994.<sup>13</sup>
- Ineligibility for Federal Student Financial Aid:

  The Higher Education Act of 1998 made students convicted of drug-related offenses ineligible for any student grant, loan, or work assistance. This federal barrier cannot be altered by the states, and no other class of offenses, including violent offenses, sex offenses, repeat offenses, or alcohol offenses, results in the automatic denial of federal financial aid eligibility. This ban makes college

- attendance extremely difficult for most former drug offenders. <sup>14</sup>
- Information Sharing and Criminal Records: The Internet and credit reports make criminal record information about former offenders easily accessible. Even arrests that are dismissed or do not end in a conviction are included in criminal record information. This information is often used against ex-offenders, effectively barring them from housing and employment opportunities. In North Carolina, criminal record information is shared with non-law enforcement entities for employment purposes until the subject reaches 80 years old or dies. <sup>15</sup>

We are just beginning to deal with the very complex ramifications of publishing criminal records in the information age. Defense lawyers regularly represent clients whose lives and livelihoods are adversely and sometimes unjustly affected by their conviction records. Judges and prosecutors have recognized the enormous collateral consequences of convictions, and they have worked to develop and participate in diversion programs that can fashion an appropriate punishment without a conviction. Now it is time for legislatures to take up this problem and bring some common sense and consistency to the way society deals with the dissemination of conviction records. In the long run, public safety will benefit from such an undertaking.

— Robert M.A. Johnson, Former President of the National District Attorneys Association, Have All Convictions Become a Life Sentence? (2007)

- Disqualification for Federally Subsidized and Public Housing: In 1988, Congress amended the U.S. Housing Act to bar admission to and allow eviction from public housing for residents who engaged in various types of criminal activity. This prohibition extends to resident family members and guests who engage in prohibited activity, including arrests that do not lead to convictions. For example, a mother whose son is arrested for a drug offense can be evicted. Public Housing Authorities (PHAs) are now authorized to perform criminal background checks on applicants and family members and may deny admission to applicants with a history of property crimes, violence against people, or other criminal acts that would adversely affect the health, safety, and welfare of other tenants. The Housing Authority in Greensboro, NC considers drugrelated and violent arrests in the admission process. In addition, the Housing Authority in Greensboro implements three to five year bans for drug related and violent convictions.<sup>16</sup>
- Barred from Public Benefits: People with felony drug convictions for conduct occurring after August 22, 1996 are barred for life from Temporary Assistance to Needy Families (TANF) and food stamps unless their state has passed legislation opting out of the ban. <sup>17</sup> In North Carolina, individuals convicted of drug-related offenses may be eligible to receive benefits six months after release if they have not committed any subsequent felony offenses and they are enrolled in or have successfully completed required substance abuse treatment. <sup>18</sup>
- Reentry Complicated by Gender: Between 1985 and 1997, the number of women in jails and prisons nearly tripled. The lack of reentry planning for the female population has a disproportionate impact on children and families. Approximately 1.5 million children have a parent in state or federal prison. Although some children live with a relative during their mother's

- incarceration, many enter the foster care system. Upon release, women face the burden of trying to find housing and employment, while simultaneously fighting to be reunited with their children.<sup>19</sup>
- Adoption and Safe Families Act in 1997 marked a shift away from family preservation and reunification in child welfare policy. Criminal convictions may prevent former offenders from becoming foster or adoptive parents even if their crimes were unrelated to parenting abilities. In North Carolina, foster parent and adoption applicants must submit to criminal record checks, although having a criminal record does not automatically disqualify an applicant.<sup>20</sup>
- Revocation of Civil Rights: In many states, former offenders are denied the rights to vote, to serve on juries, or to hold public office, thus excluding them from political, judicial, and governmental processes. In North Carolina, individuals convicted of felony offenses may vote following release from incarceration or completion of probation or parole or if pardoned by the Governor. 21 Also, in August 2006, the North Carolina General Assembly passed an election reform bill requiring the Board of Elections, the Department of Correction, and the Administrative Office of the Courts to provide written notice to individuals with felony convictions informing them of their rights to vote upon completion of their sentences, and to provide them with voter registration forms.<sup>22</sup>
- Barred from Military Service: The military was once a haven for young men who needed discipline and a second chance at being productive citizens. However, in 2003, a Federal law was enacted that barred all convicted felons from serving in the military.<sup>23</sup>

## Notable Approaches, Innovations, and Strategies

## ■ Incorporating Reentry Issues into Indigent Defense Practices

A number of indigent defense agencies are developing different strategies to incorporate reentry issues into criminal defense practices, from forming collaborative relationships to developing new models for how to handle criminal cases.

- The Public Defender Service for the District of Columbia handles cases involving the collateral consequences of a criminal arrest. Attorneys in the civil and defender units educate each other about the legal issues they confront and how the intersection of these issues affects the reentry of their clients. Also, staff attorneys work with a team of program developers and social workers in the Offender Rehabilitation Division. Their mission is to help clients plagued by mental illness, homelessness, unemployment, illiteracy, and substance abuse reintegrate into society.<sup>24</sup>
- The Bronx Defenders' Civil Action Project offers comprehensive legal services to clients by fully integrating civil representation with criminal defense practice. The office assists clients with legal problems that prevent them from reintegrating into their communities, including eviction, loss of public assistance or Medicaid, and unlawful forfeiture.<sup>25</sup>
- The Community Legal Services of Philadelphia, PA has developed expertise in the civil legal problems faced by people with criminal records. Although CLS does not have an "ex-offender unit" *per se*, several legal units do provide assistance to people who have civil legal problems caused by their criminal records, including employment, family advocacy, public benefits, and public housing problems. Moreover, the attorneys in the office have written

- extensively about reentry issues and have participated in national training conferences and listservs. <sup>26</sup>
- The Georgia Justice Project provides free criminal defense representation to any indigent person who signs a contract accepting social services such as Alcoholics Anonymous, anger management training, drug counseling, GED assistance, and job skills training. Some of the participants are employed by the program's landscaping business after incarceration. The organization has assisted thousands of persons with great success and touts an 18% recidivism rate.<sup>27</sup>
- The Neighborhood Defender Service of Harlem plans to launch the Harlem Reentry Advocacy Project. The Project will use a multidisciplinary approach to reentry services, including social services, civil legal representation, and community education. The social service component will address issues related to public benefits, mental health, substance abuse treatment, family reunification, and employment. The civil representation component will include representing ex-offenders in employment- and housing-related proceedings.<sup>28</sup>
- The Office of Appellate Defender in New York created the Social Work/Reentry program, which has a social worker on staff to provide case management, support, and necessary referrals for clients preparing for release. The program focuses on providing reentry assistance by helping former clients with housing, health care, job training, and substance abuse issues, and with acquiring government benefits. In addition, they have created a resource manual for other defender organizations looking to assist clients with reentry.<sup>29</sup>
- In New York City, the Reentry Resource Center consists of a 17-member coalition of civil and defender organizations. The coalition meets once

a month for a New York Reentry Roundtable to address ways to improve services provided to people who are re-entering society. The coalition's website, <a href="www.reentry.net/ny">www.reentry.net/ny</a>, acts as a clearinghouse for lawyers, social service providers, and individuals so they can find the information they need. For individuals reentering society, the website has quick answers to questions about which organizations provide specific services. For lawyers, it has legal research available to help them be better advocates for their clients. And for service providers, the website has information on how to apply for and obtain funding. 30

The Legal Aid of West Michigan and the Michigan Poverty Law Program host the Michigan Reentry Law Wiki, which is a collaborative effort by people involved in reentry in Michigan to provide relevant and current information on legal issues facing people with criminal records. The Law Wiki is similar to Wikipedia in that contributions from knowledgeable practitioners, scholars, and service providers involved in the reentry field are encouraged and included as substantive information on the site. The site contains information on the collateral consequences of conviction, sample pleadings, and service provider locations for formerly incarcerated people.31

#### Advocacy

Indigent defense offices around the country are developing new ways to address their clients' reentry-related issues. Some of the most notable approaches include:

Reentry Councils: The San Francisco Public Defender Office runs the Safe Communities Reentry Council (SCRC). The Council holds meetings every month to discuss reentry services and to address ways to improve the transition

- from prison to home. SCRC has about 100 members, including representatives from government agencies, community-based organizations, nonprofit legal aid organizations, and formerly incarcerated individuals.<sup>32</sup>
- Fifty-State Survey of Employment Laws Affecting Reentry: The Legal Action Center is a legal service organization based in New York that serves the reentry needs of their clients by battling the employment barriers faced by former offenders. The organization is developing the National Center to Promote the Employment of Ex-Offenders and is publishing a fifty-state survey detailing state employment laws affecting people with criminal records.<sup>33</sup>
- 1 Cynthia Works, *Reentry—The Tie that Binds Civil Legal Aid Attorneys and Public Defenders*, Clearinghouse Rev. J. of Poverty L. & Pol'y, Sept.-Oct. 2003, at 328, 330.
- 2 http://www.reentry.gov/welcome.html.
- 3 http://www.doc.state.nc.us/rap/index.htm.
- 4 http://www.whitehouse.gov/government/fbci/pri.html.
- 5 Anthony C. Thompson, *Navigating The Hidden Obstacles to Ex-Offender Reentry*, 45 B.C.L. Rev. 255, 276 (Mar. 2004).
- 6 Paul Samuels & Debbie Mukamal, After Prison: Roadblocks to Reentry: A Report on State Legal Barriers Facing People With Criminal Records, 2004 The Legal Action Center 17.
- 7 Criminal Justice/Mental Health Consensus Project, 2002 Council of State Governments xii; see also Lois A. Ventura et al., Case Management and Recidivism of Mentally Ill Persons Released From Jail, 49 Psychiatric Services, Oct. 1998, 1330-37 (examining the effect of community case management on

recidivism for jail detainees who have mental illnesses and finding that, within 36 months, 188 of 261 subjects (72%) were rearrested).

- 8 Jeremy Travis et al., From Prison to Home: The Dimensions and Consequences of Prisoner Reentry, 2001 Urb. Inst. Just. Pol'y Center 1, 17.
- 9 Sharon M. Dietrich et al., Criminal Records and Employment: Ex-Offenders Thwarted in Attempts to Earn a Living for Their Families in Every Door Closed: Barriers Facing Parents With Criminal Records, 2002 Center for L. & Soc. Pol'y 18, 19.
- 10 http://www.lac.org/lac/main.php?view=profile&subaction1=NC.
- 11 Travis et al., supra note 8, at 15.
- 12 Id. at 32.
- 13 http://www.doc.state.nc.us/victimservices/ PublicationMaterials/CitizensGuidetoStructuredSente ncingrevjan05.pdf.
- 14 Samuels & Mukamal, supra note 6, at 18.
- 15 http://www.lac.org/lac/main.php?view=profile&subaction1=NC.
- 16 Anti-Drug Abuse Act, 42 U.S.C. § 1437d (1) (5) (1998).
- 17 Comprehensive Drug Abuse and Prevention Act, 21 U.S.C. § 862a (2003) (Only eight states and the District of Columbia opted out of the ban entirely. Twenty states narrowed the restriction to exempt people in drug treatment or who completed treatment, while twenty-two states maintain the complete bar.).
- 18 http://www.lac.org/lac/main.php?view=profile&subaction1=NC.

- 19 Amy E. Hirsh et al., *Introduction in Every Door Closed: Barriers Facing Parents With Criminal Records*, 2002 Center for L. & Soc. Pol'y 11.
- 20 N.C. Gen. Stat. §§ 131D-10.3A, 48-3-309 (2008).
- 21 N.C. Const. art. VI, § 2(3); N.C. Gen. Stat. §§ 13-1, 163-55(2) (2008).
- 22 Sentencing Times, (Sentencing Project, Washington, DC), Fall 2008, at 5.
- 23 National Defense Authorization Act, 10 U.S.C. § 504 (2003).
- 24 www.pdsdc.org.
- 25 www.bronxdefenders.org.
- 26 www.cisphila.org.
- 27 www.gjp.org.
- 28 Michael Pinard, *Broadening The Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 Fordham Urb. L.J. 1067, 1094 (May 2004).
- 29 Melissa Rothstein, *Reaching Through the Prison Walls: Social Work in an Appellate Defender Office*, The Champion, Apr. 2006, at 31.
- 30 Julie Verrati, *Best Practices for Reentry Programs: Combining Defender and Civil Services for Success*, 30 Cornerstone, Sept.-Oct. 2008, at 34; *see also* http://www.reentry.net/ny/.
- 31 http://reentry.mplp.org/reentry/index.php/Main\_Page.
- 32 Verrati, *supra* note 30, at 34; *see also* http://sfpublicdefender.org/in-the-community/safe-communities-reentry-council-summit.
- 33 www.lac.org.

#### **Incarceration Issues**

#### Scenario 1

Lakeisha S. is a 25-year-old mother of two children, ages 1 and 3. Since the death of her mother in 2006, Lakeisha has been regularly using crack cocaine. Two weeks ago, Lakeisha was arrested for trying to buy drugs from an undercover officer. She was assigned a public defender to represent her, but the facts of the case are clear, which means Lakeisha will probably be convicted and have to serve some jail time. Lakeisha asks the public defender if her punishment can be structured so she can remain close to her children. The defender tells Lakeisha there is nothing he can do because the terms of her imprisonment are out of his control. Lakeisha pleads guilty to possession of cocaine and is sentenced to eight months in jail. While Lakeisha is incarcerated, her children are forced to live with a relative in another county. As a result, Lakeisha does not see her children until she is released. She is currently struggling to piece her life back together and to reestablish her relationships with her children.

#### Scenario 2

During the initial interview, Lakeisha's public defender learns that she is a mother with a substance abuse problem. Immediately he thinks of how her children would be affected by Lakeisha's involvement with the criminal justice system. He recalls a CLE that he attended which focused on the need for public defenders to start addressing the potential incarceration issues of their clients during plea negotiations. At the CLE, the defender learned about Exodus House, a program that allows young children to live with their mothers while the women serve out their sentences for nonviolent offenses. The defender asks Lakeisha if she would be interested in participating in the program, and she responds affirmatively. He subsequently arranges for Lakeisha to be involved in the program, and she is currently completing her sentence while living with her children.

#### Issue

Thirty years of prison growth have resulted in the confinement of one in 100 adults in America's prisons and jails. Every year the burgeoning cost of corrections drains more and more money from state budgets, but only makes negligible improvements in recidivism rates. At the same time, policymakers are becoming increasingly aware of research-backed alternatives to traditional incarceration, such as community corrections and treatment programs. Collectively, these trends have encouraged criminal justice stakeholders to diversify their usual array of criminal sanctions to better address the needs of incarcerated individuals while still holding them accountable for their criminal behaviors.

The child from birth to three years of age is at the most important time of his life for cognitive, social and emotional development. If we could provide these vulnerable children with a stable home and the best available services, rather than leaving them to an unknown, sometimes abusive situation, their lives could be healthier and more productive.

NC Senator Ellie Kinnaird, Our Children's
 Place: Breaking the Cycle of Crime (2006)

The policies associated with the incarceration boom of the last three decades have dramatically changed the practice of law for many indigent defense attorneys.<sup>5</sup> Many defense attorneys are reassessing how they routinely practice law. Defense attorneys have begun to have a better understanding of the impact incarceration issues have on their clients, which has led some indigent defense agencies to address client incarceration issues.<sup>6</sup> For example, issues like the

proximity of the correctional institution to the client's family, the availability of educational and treatment opportunities while incarcerated, and the ability of clients to maintain a connection with their children have become advocacy issues for some indigent defenders. In fact, a growing number of indigent defenders believe these extra-legal services are essential to a client's future success, without which many clients will fall prey to recidivism and end up back on the docket of the same public defender who attempted to help them on the original offense. They are beginning to think of ways to systemically incorporate the incarceration issues facing their clients into the defense strategy, including plea and sentencing negotiations and forming partnerships with other agencies to provide long-term solutions.

Incorporating client incarceration matters into the scope of indigent defense practice can be complicated, and indigent defense agencies need to consider some important issues. For example, the goal of the defense role would no longer be confined to just securing the least amount of jail time for their clients. Indigent defenders might be expected to serve as a point of contact for the coordination of a range of client services. <sup>10</sup> Moreover, some indigent defense agencies believe the attorney-client relationship should not end at the conclusion of the legal proceeding. In fact, in a number of cases the relationship could carry over to the conclusion of the client's sentence. Consequently, some indigent defense offices have sought additional support from the outside, such as social workers, community program developers, and civil legal aid attorneys.11

## Notable Approaches, Innovations and Strategies

Across the country, indigent defenders, correctional agencies, and non-profit organizations are developing creative ways to address client incarceration issues. Some of the most notable programs and strategies include:

- Children of Incarcerated Parents Program: The San Francisco Children of Incarcerated Parents (CIP) Program's mission is to help promote a healthy relationship between children and their incarcerated parents. The program was envisioned and initiated by Jeff Adachi, San Francisco's publicly elected Public Defender, in partnership with the Zellerbach Family Foundation. The CIP Program is part of the Reentry Unit, which provides clients of the Public Defender's Office with a combination of legal and social support. The CIP Program staff works with clients, their families, the deputy public defenders, and a network of community-based treatment providers to respond to the needs of incarcerated parents and their families. The services provided include addressing the urgent needs of children, setting up visitation, assisting clients with family court or paperwork, and connecting clients and their families to additional social services. The CIP social worker provides some direct services to clients. Additional services such as parenting classes, counseling, transportation, food or income assistance, residential treatment programs, and training or employment services are provided through referrals from the CIP social worker to other service providers. The goals of these services are to insulate children from the risks associated with parental incarceration, maintain family bonds through the period of incarceration, and improve the ability of clients to participate in family life upon their release.12
- Public and Private Program Collaboration for Incarcerated Mothers: Our Children's Place is a nonprofit organization located in Chapel Hill, North Carolina. The primary mission of Our Children's Place is to elevate the overall wellbeing of children of incarcerated parents in North Carolina and to promote and protect their rights so that the intergenerational cycles of poverty, crime, and violence can be broken. It is designed to allow children to live with their mothers in a

community-based nonprofit facility while the women serve their sentences for nonviolent offenses and participate in a continuum of care program. For the children, living in this environment will help them bond with their mothers and enhance their overall development. A secondary benefit to the children is the continuum of care the mothers will receive as part of their participation in the program. Services include substance abuse treatment, mental health and health care, academic and parental education, vocational training, life skills education, and reentry services. With support from the Z. Smith Reynolds Foundation and the Governor's Crime Commission, Our Children's Place is endorsed by the North Carolina Covenant for Children. Partners include the Department of Health and Human Services, the Department of Correction, and the Department of Administration. It is the only public-private program of its kind in North Carolina.<sup>13</sup>

1 Jenifer Warren, *One in 100: Behind Bars in America* 2008, 2008 The Pew Charitable Trusts Public Safety Performance Project at 3.

2 *Id*.

3 *Id*.

4 *Id*.

5 Cynthia Works, *Reentry – The Tie That Binds Civil Legal Aid Attorneys and Public Defenders*, J. of Poverty L. & Pol'y, Sept.-Oct. 2003, at 329.

6 Melissa Sills, *Children of Incarcerated Parents Program* (Office of the San Francisco Public Defender, San Francisco, CA), Mar. 2008, at 9.

7 *Id*.

8 Works, *supra* note 5, at 330.

9 Id. at 331.

10 Id.

11 Professor Anthony C. Thompson, N.Y.U. School of Law, Address at the National Legal Aid Defender Association Annual Conference: Preparing for the Tidal Wave of Prisoner Reentry: Equipping Civil Legal Aid and Defense Lawyers to Represent the Whole Client (Nov. 14, 2002).

12 Sills, *supra* note 6, at 9-16.

13 Sarah J. Shaphard, *Our Children's Place: Breaking the Cycle of Crime*, North Carolina Advocates for Justice, Trial Briefs, Oct. 2006 at 28-29.

#### Expungement

#### Scenario 1

Jane B., age 22, was convicted of misdemeanor larceny when she was 17. Since that time, Jane has enrolled in college and is on track to earn a bachelor's degree in finance. However, whenever Jane applies for a job or an apartment, the old larceny conviction shows up on criminal record checks. Recently, Jane was attending an off-campus party and got arrested during a police sting on underage drinking. Because Jane did not have her identification to prove her age, she was hauled downtown. Jane was assigned a public defender and showed him her driver's license. He advised her that the charge for underage drinking would be dismissed because she was clearly of legal age. Jane used this opportunity to tell the public defender about the larceny conviction and asked if there was any way to get the offense removed from her record. He responded that there was, but he could not help with the matter because public defenders usually are not allowed to seek expungements for their clients. Jane left the office despondent. She eventually earned her finance degree but has not been able to find a job in the field.

#### Scenario 2

After the charge for underage drinking was dismissed, Jane told her lawyer about the prior larceny conviction and the problems she was having finding a good job and solicited his help with removing the offense from her record. He told her that he could not help her with an expungement petition, but he was able to give her a fact sheet detailing some frequently asked questions about expungements and listing the Legal Aid offices in the area that help clients with this problem. A few weeks later, Jane went to a Legal Aid office and was told she was eligible for an expungement. She is hopeful this remedy will help her achieve her job goals.

#### **Issue**

Expungement is the term used for the process of sealing or erasing an individual's official criminal record, including records of arrests and/or convictions. The aim of the legal remedy is to give people the chance to put past contact with the criminal justice system behind them.<sup>2</sup> It is important to understand that criminal record histories are based on criminal arrests and, even if the arrest is dismissed or does not end in a conviction, the arrest continues to appear in a criminal record check. Furthermore, the data sources the public uses to conduct criminal record inquiries do not make any distinction between convictions and non-convictions. To appreciate how serious this situation is for individuals, this report includes a sample of what criminal record histories look like to the general public (see pages 67 to 71). The sample, which is from *The Slammer*, was found displayed on the publication rack near the checkout counter of a convenience store.

Expunging criminal records requires the balancing of divergent community interests.<sup>3</sup> On the one hand, the government must protect society by maintaining criminal record data to assist in future criminal investigations.<sup>4</sup> In addition, employers and landlords ask for criminal history information to make informed hiring, rental, and other decisions.<sup>5</sup> On the other hand, society should not penalize people who were wrongly arrested or have not been convicted. Moreover, society has a vested interest in the successful reintegration of former offenders to prevent recidivism and to increase public safety, and the stigma of a criminal arrest or conviction inhibits the ability of former offenders to successfully reenter society.<sup>6</sup>

In recent years, expungement has become a more salient issue because of the public's easy access to criminal record information and the burgeoning number of people with criminal histories. Recent advances in technology have allowed criminal justice agencies and private data providers to make criminal record information accessible to the general public at

the click of a mouse.<sup>7</sup> At the same time, the number of individuals with criminal histories has increased dramatically. In 1993, one in every ten adults over the age of 16 in North Carolina, or 560,400 people, had a criminal record.8 In 2003, just ten years later, one in six adults over the age of 16 in North Carolina, or 1,077,300 people, had a criminal record.<sup>9</sup> These facts coupled with the post-September 11th focus on national security, which has caused employers to become even more wary of people with criminal records, make access to expungement remedies all the more vital. As a result, criminal justice scholars, policymakers, and indigent defense practitioners are discussing reforming anachronistic expungement statutes, as well as adopting alternative remedies that will enable people to put their past entanglements with the criminal justice system behind them.

Generally, there are three categories of cases where expungement may be applied:<sup>10</sup>

- Actual Innocence: It is conclusively determined that a person did not commit the offense for which he or she was arrested or convicted.
- Charges Dismissed or a Finding of Not Guilty: Charges were dropped prior to trial, or the person was acquitted at trial.
- Criminal Conviction: The defendant was convicted of committing the offense.

People fitting in the first category of cases are considered the most worthy of an expungement because their criminal records should have never existed. Cases falling into the second and third categories are more debatable, and policy judgments must be made regarding when individuals in those situations deserve expungement relief. Currently, thirty-six states grant expungements if the charges against an individual were dropped or they were acquitted at trial. Twenty-six states, the District of Columbia, Puerto Rico, and the Virgin Islands have statutes that provide for the expungement of felony convictions.

The effect of being granted an expungement varies from state to state. <sup>15</sup> In some, the record is destroyed by the state criminal history repository. <sup>16</sup> In others, the record is retained with the expungement action noted on the record. <sup>17</sup> Others seal the record to the general public, but allow law enforcement agencies access for investigatory purposes. <sup>18</sup> In North Carolina, the criminal record is completely erased from judicial and law enforcement records. However, the Administrative Office of the Courts keeps a confidential list of people who have received expungements. <sup>19</sup>

In North Carolina, expungement is generally limited to the following situations:

- Misdemeanor Convictions Committed Before
  Age 18: To qualify for relief the individual must
  have no prior felony or misdemeanor convictions,
  be under 18 years old at the time of the
  conviction, have no outstanding fines or
  restitution, display two years of good behavior,
  and have not previously been granted an
  expungement.<sup>20</sup>
- Misdemeanor Possession of Alcohol Conviction before Age 21: To qualify for relief the individual must have no prior felony or misdemeanor convictions, be under 21 years old at the time of the conviction, have no outstanding fines or restitution, display two years of good behavior, and have not previously been granted an expungement.<sup>21</sup>
- Charges Dismissed or Findings of Not Guilty: To qualify for relief the individual must have no prior felony convictions and have not previously been granted an expungement, and the charges must have been dismissed or the individual found not guilty at trial.<sup>22</sup>
- Charges Dismissed or Findings of Not Guilty as a Result of Identity Theft: To qualify for relief the individual must show the charge(s) resulted from another person's use of the individual's identity,

the charges were dismissed or the conviction was set aside or the individual was found not guilty at trial, and the individual's identity was used without his or her knowledge.<sup>23</sup>

Under North Carolina law, an individual is only allowed one expungement per lifetime. However, exceptions are granted in the case of an expungement based on identity theft.<sup>24</sup> Therefore, if an individual is eligible for an expungement under multiple statutory provisions, he or she must be very judicious in selecting which charge to expunge. Once an expungement has been granted, the individual can respond to questions about the expunged offense as if it never happened.<sup>25</sup>

## Notable Approaches, Innovations, and Strategies

In jurisdictions across the country, scholars, indigent defense practitioners, and policymakers believe more people should have the opportunity to put their criminal records behind them. Many indigent defense agencies believe indigent defense should play an active role in providing expungement services, information, or referrals to organizations that do handle expungements as a part of their standard legal practice. Some notable examples include:

#### Statutory Reform

The Council of Court Excellence (CCE) is a nonpartisan, civic organization based in Washington, DC that works to identify and promote court reforms, improve public access to justice, and increase public understanding and support for the justice system. In 2005, CCE established a subcommittee to reform Washington, DC's outdated expungement statute. The subcommittee consisted of members from major stakeholders in the criminal justice system, including the U.S. Attorney's Office for DC, the DC Office of the Attorney General, the Public Defender Service for the District of Columbia,

- and the DC Pretrial Services Agency. The subcommittee submitted a report to the CCE that outlined areas for statutory reform and included model expungement legislation.<sup>26</sup>
- Six states have passed legislation offering
  Certificates of Relief from Disabilities. A
  Certificate of Relief is a legal remedy designed to
  have a positive effect on the employment
  prospects of people convicted of crimes. In many
  states, occupational licenses are required to
  engage in certain types of employment, and
  having a Certificate of Relief helps an individual
  meet the "good moral character" licensing
  standard, while also serving as presumptive
  evidence of rehabilitation. The six states that have
  enacted this legislation include California, New
  York, New Jersey, Nevada, Connecticut, and
  Illinois.<sup>27</sup>

#### Indigent Defense Expungements

- The Kern County Public Defender Office, Kern County, CA, has a program that provides assistance to expunge criminal records of former misdemeanants. The program has completed over 600 expungement petitions since its inception and has been well received by judges and court administrators.
- Public defenders in Sonoma County, CA also run an expungement program to help welfare recipients expunge their criminal records or apply for certificates of rehabilitation in order to qualify for jobs. The program offers employment assistance to clients, fosters positive community relations, and increases public support for the defense function in California.<sup>28</sup>
- In some states, such as North Carolina, public defenders are not authorized to handle expungements for clients. Some of these jurisdictions have put together expungement information packets, or "How To" instructions for

the public, which they post on their websites or provide to defense attorneys to give to clients. The North Carolina Office of Indigent Defense Services (IDS) is currently developing a "How To" expungement packet that will be posted on the IDS website.

#### Non-profits and Expungement

The Council on Crime and Justice, a non-profit in Minneapolis, MN, launched its Criminal Expungement Clinic (CEC) in August 2005. In addition to advocating for the reform of expungement law in Minnesota, the CEC also provides direct legal services to individuals who are eligible for expungements.

1 Leslie McAdoo, Creating an Expungement Statute for the District of Columbia: A Report and Proposed Legislation, 2006 Council for Court Excellence 1.

2 *Id*.

3 *Id*. at 2.

4 *Id*.

5 *Id*.

6 *Id*.

7 Michael Mayfield, Revisiting Expungement: Concealing Information in the Information Age, Utah L. Rev. 1057, 1065 (1997); see also Bureau of Justice Statistics, 2003 Survey of State Criminal History Information Systems (49 States, D.C., and Puerto Rico have automated some records).

8 Bureau of Justice Statistics, 1997 Survey of State Criminal History Information Systems 2.

9 Bureau of Justice Statistics, 2003 Survey of State Criminal History Information Systems 3.

10 McAdoo, supra note 1, at 1.

11 *Id*.

12 Id.

13 Id.

14 Bureau of Justice Statistics, 2003 Survey of State Criminal History Information Systems 4.

15 Margaret Colgate Love, *Starting Over With A Clean Slate: In Praise of A Forgotten Section of The Model Penal Code*, 30 Fordham Urb. L..J. 1705, 1725 (July 2003).

16 Id.

17 Id.

18 Id.

19 N.C. Gen. Stat. §15A-146 (2007).

20 N.C. Gen. Stat. §15A-145 (2007).

21 *Id*.

22 N.C. Gen. Stat. §15A-146 (2007).

23 N.C. Gen. Stat. §15A-147 (2007).

24 *Id*.

25 N.C. Gen. Stat. §§15A-145, 15A-146, 15A-147 (2007).

26 McAdoo, supra note 1, at 2.

27 Collateral Sanctions Committee, Collateral Sanctions of a Criminal Record: Special Report to the Minn. Leg. at 44-45, Jan. 2008.

28 Cait Clarke, Problem Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor, 14 Geo. J. Legal Ethics 401, 446 (Winter 2001).



OCTOEER 17 - OCTOEER 24, 2008 МАКЕ СОИЛТУ ЕППОМ

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DOMESTIC VIOLENCE THIS WEEK'S CENTER SPREAD



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SOUDERS, ELIZABETH V.



**PURSE SNATCHER FLEES THEATER** 







REGISTER, ELAINE B. ASSAULT W/DW SERIOUS INJ



THENS

WOST WANTED

DOMESTIC MOLENCE

SEX OFFENDERS

DWs

THE SALON

NEWS





HAMM, HASSAN A. HABITUAL FELON



MEDLIN, WENDY R.



SCHREIER, ALLISON M. SIMPLE ASSAULT



DOMINGUEZ, PEDRO L. BURGLARY 2ND DEGREE



LYLES, SHANNA E. CONSPIRE SELL COCAINE



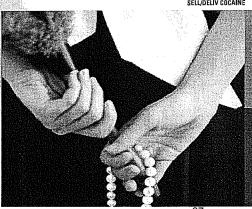
P/W/I/S/D COCAINE SELL/DELIV COCAINE



STRICKLAND, WANDA K. ASSA ON GOV OFFICAL RESIST/OBSTR PUBLIC OFFICER



MCCRERY, JOSHUA R. FEL HIT/RUN PER INJ IDENTITY THEFT



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# PURSE SNATCHER FLEES THEATER



Raleigh Police are asking for any information in an October 8th robbery. A woman was robbed just outside a movie theater on Blue Ridge Road. The suspect, caught on surveillance camera, grabbed the victim's purse just as she was entering the theater, and fled immediately. She was unharmed.

The suspect was a black man with a medium skin tone. His height was about 5'10" and his weight is estimated to be about 200 pounds. The suspect wore a light colored jacket with a distinct design on its front, a bright yellow baseball hat, blue jeans, and white sneakers. Any information on the whereabouts of the suspect should be directed to the Raleigh Police Department's Detective Division at (919) 890-3555 or CrimeStoppers at (919) 226-CRIME.

# PREGNANT WOMAN SHOT BY HUSBAND, POLICE SAY

The Alamance County Sherill's Office, Graham PD, and Mebane PD all played a role in last week's arrest of a Mebane man authorities believe shot his 27-weeks

pregnant wife in the stomach, then waited over 24 hours to call for medical help! Robert Thompson Broom, 37, is charged with shooting Danna Broom, who was airlifted to Duke and underwent an emergency delivery of the tiny premature baby. Both are still alive.

At first the shooting was believed to have been an accident. As the investigation went along, detectives believed that Broom had intentionally tried to murder his wife. He has been charged with kidnapping, assault, and attempted murder. He is under \$800,000 bond in Alamance County jail.



### **CRIME STOPPERS**

Wanted: Raleigh Robber

Just before 11:30am on Monday, a suspect robbed a DSS Quality Thrift Store at 5655-E Western Boulevard with a hidden weapon. Nobody was injured during the

The suspect is described as a black male, 5'7" tall, 140-170 pounds. He has medium complexion and was wearing dark trousers and a gray hat or a gray hoodic.

If you have information that might assist the investigation, there are some people who'd love to hear from you: Raleigh Police Department Detective Division (919) 890-3555 or CrimeStoppers (919) 226-CRIME.



SCHEMEN NOVEMBER



ASSAULT ON CHEROLOGER 12



SEALING SO ACITEMINES
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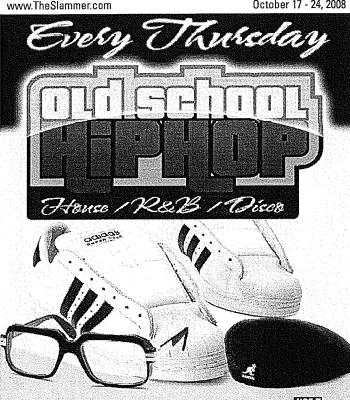
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MAGANA, SASHA V. Fugitive from Justice SERVICE W/O PROCESS



JOHNSON, HELENA E. LARCENY



OCHOA, ALEXIS A P/W/I/S/D COCAINE TRAFFIC COCAINE



BLAYLOCK, CURTIS J BREAK ENTER MOTOR VEHICLE LARCERY OF IAV (Felony)



EATMAII, COREY L. POSS STOLEN GOODS UNIURY TO REAL PROP



PRATTIS, JONNELL A. EMBEZZLEMENT



LASSITER, DURELL L. ARMED ROBBERY
POSS FIREARMS BY FELON



STONE, SHANICE L.



WADE, JOHATHAN A



LOWERY, MARSHALL O. LARCENY SIMPLE POS MARUUAHA



TOWNS, WILLIAM S. Breaking and Entering LARCEHY (Felony)



CHESSON, HAYKIA Larceny



WILLIAMS, CHRISTOPHER M PROBATION VIOLATION



HUHLEY, MORGAN M. FAIL TO APPEAR FELONY FAIL TO APPEAR





FUARS BARRET I







CAMPBELL, CYNTHIA A. FAIL TO APPEAR



SCHIFFER, DAVIO J



PRICE, YOLAHDA E. FAIL TO APPEAR



SEGER, JOHN P



WOODARD, JIMMY E. FAIL TO APPEAR



DIXON, TYWANDA R. MV RENTAL FRAUD

These individuals have been charged with offenses against women or children, or for violating domestic violence protective orders that were issued by the court. Others charged with these same offenses are found elsewhere in this issue. All suspects are innocent until proven guilty.



JONES, CHRISTOPHER L. **ASSAULT ON FEMALE** 



HARPER, STEPHEN J. **YIOLATE DOM VIOL PROTCT ORD** 



AYERS, STANLEY T. ASSAULT ON FEMALE COMMUNICATING THREATS



WASHINGTON, FREDERICK B. ROBBERY STRONG ARM ASSAULT ON FEMALE



ORIE, CARY ASSAULT ON FEMALE



JOHNSON, DONTEZ D. ASSAULT ON FEMALE PROBATION VIOLATION



THOMPSON, JOHN V. ASSAULT ON FEMALE



DUNN, ANTHONY L ASSAULT INFLICT SERIOUS INJ ASSAULT ON FEMALE



PEGG, RANDALL D. INJURY TO PERSONAL PROPERTY



JIMENEZ, AGUSTIN M. ASSAULT ON FEMALE



KOLBINSKY, JONATHAN D. VIOLATE DOM VIOL PROTCT ORD



STOCKWELL, STEPHEN M. SIMPLE ASSAULT ASSAULT ON FEMALE

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# KIDDIE KORNER



LOPEZ, ALBERTO O. ORTAIN PRO FAI SE PRETENSE



AUSTIN, CHRISTOPHER J.



SHOKE, JOSPEH J.

DOMESTIC CRIMINAL TRESPASS
INKIRY TO REAL PROP



FAIL TO APPEAR FELONY



KRUK, CHESTER M. Break enter motor vehicle Conspiracy



FERGUSON, BENDAMIN R.



HERHANDEZ, HANNAH



OOPER, ASHLEY N.



CROOM, HILLARY O. Breaking and Entering



JACKSON, KENTRELL A EMBEZZLEMENT



SMITH, SHANTEL M.
LARCENY
RESIST/OBSTR PUBLIC OFFICER



VIHES, DEQUAN J. Larceny (Folony) Dreaxing and entering



LETENDRE, SETN T.

BREAK ENTER MOTOR VEHICLE
LARCENY (Felony)



CASTANO-GARICA, JOSUE DRIVE WHILE LIC REVOKED



KAY, DAHNY J Obtain pro false pretense



MEDLIN, ANTHONY O



JONES, DEVINT.



BROWN, DONNIQUE A



COVINGTON, DELQUOR A



OHALLORAN, GARRETT G.
DISCHREE FIREARM
ALTERING REMOV SERIAL NO



BROOKS, BRADLEY S.



ANDERSON, TORREY L.



MULDROW, CHRISTOPHER



MESON, HEATHER M

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DEBIT

## NYPD CLOSING IN ON BLACK WIDOW

It's a timeless story, one that involves insurance fraud and murder, all in the cultural melting pot of New York City. The wife of a wealthy man hires a hit

melting pot of New York City. The wife of a wealthy man hires a hirman to off her husband for the life insurance. And after 18 years, the story is nearing its close for Barbara Kogan. Her husband, George Kogan, a millionaire real estate broker in Manhattan, was shot three times in the back in October 1990 outside his mistress' apartment. As he lay in the hospital on his deathbed, his wife was nowhere to be found, according to the New York Post.

Barbara, a once talented singer with a record contract at 16, was the sole beneficiary of her husband's \$4.3 million life insurance

plan. Family members noted her lack of care over the murder. She talked more about his will than funeral arrangements.



The Kogans went through a bitter divorce. The lawyer who represented Barbara Kogan, Manuel Martinez, received a 25 year jail sentence in May of this year as an accomplice. He flew Mrs. Kogan down to Puerto Rico to find a hit man. The hired gunman who shot Kogan has not been arrested in connection with that crime. NY prosceutors hope to have a case against the widow soon. They have been trying for 18 years to nail her. With her accomplice out of the way, it is only a matter of time. Barbara Kogan currently resides in San Juan, Puerto Rico.

## MILLBROOK STUDENT TURNS HIMSELF IN

A Millbrook High School student wanted for stabbing a classmate in September turned himself in on Monday morning.



Tamarius Deonte Dickerson, 17, is charged with assault with a deadly weapon with intent to kill inflicting serious injury. His victim, classmate Dominique Thomas, 18, was stabbed several times but managed to walk away, even driving himself to WakeMed's Raleigh Campus.

Dickerson spent the better part of a month laying low, and authorities tried to arrest him multiple times, including at his home. He's now being held in the Wake County jail on a \$51,000 bond.

This group represents a randomly selected portion of the individuals charged with DWI in Wake County recently. All suspects are innocent until proven guilty.





DWI DRIVE AFTER CONSUMING >21



HUCHES, DEANHA R. DWI No drivers license



leatured impaired driver

Can you guess why my man Cliffy is all puckered up? On accounta' he knows he has just kissed his sweet driver's license good-bye. Clifton Wade Alston has been down this road before last Thursday, sec. This ain't his first rodeo. It ain't even his second rodeo. At 46 he knows good and doggone well he can't be driving no car when he's been drinking. He can count on old Pat and Charley from now on, or his Chev'a-lay. Plenty of time to whistle a tune while he's chugging down the side of the road.

# Part II.2: Serving the Client More Effectively

Across the country, indigent defense agencies are identifying ways to better serve their clients. For example, several offices have developed strategies to address the burgeoning diversity of the client population. This section highlights some of the techniques used by indigent defenders to better serve the client population.

- A. Client-Centered Approach
- B. Mental Health
- C. Marginalized and Underserved Populations
- D. Cultural Competence

#### **Client-Centered Approach**

#### Scenario 1

Ronnie C. is 22 years old and lives in a tough section of town with his younger brother and grandmother. Despite his surroundings, Ronnie has managed to stay out of trouble and is on track to graduate from the local community college with a degree in hospitality management. A few years ago, the city passed some anti-loitering ordinances to help curb the spike in gang violence. Ronnie is not gang affiliated, but he occasionally stops on the corner and hollers at the homeboys in the neighborhood. Last week, during one brief exchange, the police pulled up and froze the scene. Afterwards, a gun and some marijuana were found in the bushes, and everyone present was arrested and booked downtown. During intake, Ronnie's public defender quickly looked at Ronnie's sagging pants, braided hair, and gold teeth and surmised that Ronnie was a gang member. The public defender never really took the time to listen to Ronnie's side of the story and suggested that Ronnie take the first available plea bargain. Ronnie responded that he wanted to go to trial because he was innocent. The public defender told Ronnie that going to trial was a bad idea because the judge would get upset and harshly sentence Ronnie if he was found guilty. Ronnie felt pressured to make the decision his attorney suggested. He accepted a plea bargain to have the gun charge dropped in exchange for a guilty plea to the marijuana charge. As a result of the marijuana conviction, Ronnie lost his financial aid to college and was eventually suspended by the school disciplinary board.

#### Scenario 2

During the initial interview, Ronnie's public defender encourages Ronnie to talk about his background and tell his side of the story. He learns that Ronnie graduated in the top 25% of his high school class and is two semesters away from earning an associate's

degree. Ronnie shares that it is hard not to side with a gang in his neighborhood, but he has managed to fly under the radar. The public defender checks the gang member registry, which confirms Ronnie's claim of neutrality. He also investigates Ronnie's reputation in the neighborhood. All of the people he interviews claim that Ronnie is a good kid with a lot going for him. However, some interviewees do mention having seen him on the corner. The public defender asks Ronnie about the corner activity, and Ronnie tells him that he occasionally hangs with the fellas to keep them off him and his younger brother. The public defender advises Ronnie that the judge may choose to punish Ronnie more severely if he is found guilty at trial, but the public defender remains neutral and allows Ronnie to make his own decision. Ronnie decides to go trial. The public defender severs Ronnie's case from his co-defendants and, with the help of the information uncovered during the investigation stage, Ronnie is acquitted of all charges. Four months later Ronnie graduates from junior college and starts a job at the Marriott.

#### Issue

The traditional view of the lawyer-client relationship maintains that clients should decide the overall goals of the representation, with the lawyer exercising a great deal of influence over how such decisions are made. This view holds that the client should be passive during the lawyer-client interaction, while the attorney details the relevant legal considerations necessary for a decision and indicates what decision the attorney believes the client should make. Next, the lawyer encourages the client to make a decision consistent with his or her recommendation.

The traditional model of the lawyer-client relationship presumes that the attorney's legal expertise usually places the attorney in a better position to assess client case outcomes than the client, which has the effect of placing clients into the role of "listener." However, recent socio-legal research has revealed flaws in this assumption. Simply, the pressures of financial

incentives and carrying high caseloads limit the amount of time attorneys have available to devote to individual cases. It means that often attorneys have not taken the time to fully understand clients' individual mental, economic, and family situations. In fact, a traditional model of lawyering often believes these issues to be extraneous to the case. The result is that an attorney's perception of what constitutes good lawyering and what is a good legal outcome may not be the same as the client's.

Client-centered representation is the belief that the traditional approach to the lawyer-client relationship needs to change. Attorneys need to learn how to effectively communicate with clients, a skill in itself, and have broader understandings of how the criminal justice system impacts clients. Successfully integrating these two facets will lead to client-centered representation, which is designed to foster client-driven decision-making.<sup>5</sup>

#### Clients Lose Respect for Defense Counsel

Critics of the traditional model have asserted that the model does not produce a meaningful interchange between the lawyer and client and effectively silences the voice of the client.<sup>6</sup> This criticism is particularly acute in indigent defense representation because dissatisfied clients rarely have the power to "fire" their court appointed attorneys.<sup>7</sup> Their role as consumers in the public defense system is not valued, and client satisfaction has not been a routine measure of defender performance.<sup>8</sup> Indigent defense clients lack the power to effectively demand accountability, fair treatment, and quality lawyers.<sup>9</sup> As a result, clients often view court appointed attorneys as simply another part of the court system that is against them.

In turn, lawyers for the poor, who once were seen as the last line of defense for marginalized communities, now find themselves aggravated and angry about how their clients perceive them. <sup>10</sup> Statements like: "I need to hire a real lawyer" or "my public pretender is

working for the prosecution" frustrate and negatively influence the way indigent defenders interact with their clients and their communities. Some attorneys begin to depersonalize their clients, viewing cases as products on an assembly line. Consequently, the relationships between indigent clients, court appointed lawyers, and their communities can suffer tremendously. Not surprisingly, community trust and support for the public defense function has eroded. Support for the public defense function has eroded.

Representing a person, not a file, in every case keeps lawyers from inadvertently working to their clients' detriment. For example, if lawyers do not find out that clients are noncitizens, they may urge as "the best possible deal" plea bargains that result in deportation. If they do not know that a young client has suffered abuse, they may miss a winning defense. If lawyers do not take the time and effort to gain their clients' trust, these and other important facts will not be disclosed.

 Jonathan E. Gradess, Clients and the Client Community Deserve a Say in Defense Services, 2001 Public Defense Backup Center Report.

#### Client Influence at a System Level

At a system level, clients are rarely consulted or have members who represent their interests on the indigent defense boards, commissions, or other decisionmaking bodies that provide oversight of the defense system. Client evaluations or feedback on attorney performance are rarely solicited or included as a routine measure of defender performance and, in fact, are often distrusted.

#### Client-Centered Representation Emerges

In response to this negative reality, a new paradigm of client counseling has emerged, known as clientcentered representation. Client-centered representation is defined as legal counseling designed to foster client decision-making.<sup>14</sup> Many of the model's earliest proponents were legal service or public interest lawyers. 15 The experience of these lawyers with poor clients had a profound impact on their assessment of the problems in the lawyer-client relationship. 16 The goals of client-centered counseling are to provide opportunities for clients to make decisions while enhancing the likelihood that those decisions are truly the clients' and not the lawyers'. The pioneers of this model of counseling are David Binder and Susan Price. Their text, Legal Interviewing and Counseling: A Client-Centered Approach, detailed a structured counseling model with the following principles:<sup>18</sup>

- During the initial interview the lawyer should gain the trust of the client by actively listening to his or her story without overtly steering the conversation toward fact gathering. Moreover, the practice of allowing the client to speak freely about his or her situation gives the lawyer the opportunity to learn of collateral matters that are important to the client and may impact the resolution of the case. <sup>19</sup>
- Once the client has had the opportunity to vent, the lawyer should begin developing the frame of the case by reiterating relevant facts mentioned by the client. In addition, the lawyer should attempt to strengthen the bond of trust by mentioning facts that may not be legally significant to the instant case but that are important to the client.<sup>20</sup>
- Next, the lawyer should set out legal alternatives for the client and solicit the client's input on generating additional alternatives.<sup>21</sup>
- Then, the lawyer should engage the client in a discussion of the positive and negative

- consequences of the legal options. Included in this discussion should be an evaluation of the social, psychological, and economic consequences that will potentially impact the client.<sup>22</sup>
- Finally, the lawyer should assist the client in weighing these consequences with an eye towards having the client make the final decision.<sup>23</sup>

The system for providing public defense services should have a client advisory board that assists administrators in planning and helps in the design, maintenance and administration of the system. Client satisfaction should be a primary component of defender professionalism as well as an important measure of defender performance. Tools for the assessment of client satisfaction should be developed and methodically used by defender offices.

 Jonathan E. Gradess, Clients and the Client Community Deserve a Say in Defense Services, 2001 Public Defense Backup Center Report.

In summary, to develop a client-centered approach, an indigent defense attorney should acknowledge that the client owns the problem and the solution, understand the motivations involved (the client's and his or her own), actively listen to the client and develop a case theory jointly, and counsel with the understanding that the client is the primary decision-maker.<sup>24</sup>

The most important client-centered attorney practice is the understanding that the client is the primary decision-maker and that clients are in better positions to evaluate which legal alternatives are most likely to bring the greatest client satisfaction.<sup>25</sup> This requires the lawyer to know the value and importance the client attaches to each consequence, which requires both parties to communicate honestly and effectively.<sup>26</sup> Studies have shown clients are easily swayed by what they believe their lawyers think is best for them.<sup>27</sup> Thus, it is critical that the lawyer consciously communicate his or her neutrality to the client throughout the counseling process.<sup>28</sup>

Ultimately, a client-centered approach means clients and their communities have a say in the design, maintenance, and evaluation of public defense services.<sup>29</sup> When each client is treated with dignity and respect, indigent defense lawyers, the agencies they work in, and the criminal justice system reacquire the legitimacy they once possessed in the community.

## Notable Approaches, Innovations, and Strategies

Across the country, indigent defense agencies have implemented practices that facilitate client-centered representation. Some of the most notable practices include:

- Training Programs that Teach How to Be Client-Centered
- Minneapolis, MN has a training program for new attorneys, which emphasizes a client-centered culture in public defense. During the training, new attorneys analyze each issue in a case from a client's perspective by asking themselves the following questions: How does this action help or harm the client? What strategies maximize the client's options?<sup>30</sup>
- The International Human Rights Law Clinic at American University trains students in law school to have a client-centered approach to lawyering. Students learn client-centered attorney practices

by interviewing, counseling, and understanding the perspective of clients who have undergone egregious human rights abuses.<sup>31</sup>

#### Client-Friendly Environments

- Bronx Defenders, Bronx, NY: It is important for clients not to feel like they are stepping into a police station, prison, or court room when they enter public defender offices. Locked doors and security panels, dilapidated furniture, barren walls, inhospitable spaces, and inaccessible attorneys make clients feel devalued and that their attorneys are afraid of them.
- The Bronx Defenders in New York were conscious of creating an office culture that is open and welcoming to clients. Their waiting area is warm and comfortable for clients and includes a phone for their use and toys for their children to play with. The office floor plan replaced hallways of closed private offices with an open floor plan where attorney teams work together. In addition, they have an open-door policy that allows potential clients to call or drop in for consultation.<sup>32</sup>

#### Client-Centered Policies

Dorchester County Public Defender Office, Cambridge, MD: The Dorchester County Public Defender Office has an office policy of not scheduling attorney jail visits with clients that may potentially interfere with family visits.<sup>33</sup>

#### Client Representation on Decision-Making Bodies

A number of indigent defense agencies have developed practices that allow for client participation in decision-making, including having clients or client representatives on their commission or board of directors, establishing client advisory boards or committees, and

- establishing schedules of regular meetings between agency administrators and clients.
- Georgia Justice Project, Atlanta, GA: The Georgia Justice Project in Atlanta has a client representative on their Board of Directors.<sup>34</sup>
- Genesee County Public Defender, NY: The Genesee County Public Defender Office in New York includes client representatives on their Community Advisory Board.<sup>35</sup>
- New York Defenders Association (NYDA), NY: NYDA has opened its membership to nonlawyers, including ex-offenders.36 NYDA is a non-profit membership organization that has served New York's criminal defense community since 1967. Its objectives are to improve the quality of public defense services in New York State, establish standards for practice in the representation of poor people, and engage in a statewide program of community legal education. NYDA hired a client community organizer to collect feedback from former clients, families of clients, and the community. NYDA has a Client Advisory Board, which created Standards for Client Centered Representation. The Standards were then reviewed and refined by focus groups, the client community, and public defense clients in prison.<sup>37</sup> NYDA's client-centered representation standards assert that clients want a lawyer who:<sup>38</sup>
  - 1. Represents a person, not a case file; represents a client, not a defendant.
  - 2. Listens to them and represents them with compassion, dignity, and respect.
  - Makes sure the client's privacy is respected and that communications take place in a space and by means that protect the confidential nature of the client-attorney relationship.

- Refrains from displays of affection and other behavior with the prosecution that might project the image of a conflict of interest.
- Meets with them and visits them when incarcerated, accepts phone calls, answers letters, and takes time to counsel and explain in a manner that communicates understanding and respect.
- Listens to the client's family and, with permission of the client, shares and exchanges information so that the client, lawyer, and client's family remain informed.
- Uses language in court, legal writing, and conversation that is clear and understandable to the client.
- Pursues an investigation of the facts of the case, is culturally sensitive, appreciates the dimensions of the client's life, and becomes familiar with the client's community.
- Acknowledges cultural values, beliefs, and prejudices that might affect his or her ability to effectively represent a client and takes appropriate steps to shield the client from resulting harm.
- Thoroughly and carefully reads all documents, discusses them with his or her client, and provides the client with copies.
- 11. Knows the law and investigates the facts, and applies the knowledge of both creatively, competently, and expeditiously.

- 12. Aggressively seeks resources, such as interpreters, experts, and investigators, necessary for effective representation.
- 13. Works and strategizes in collaboration with the client.
- 14. Is committed to obtaining the best outcome for the client, zealously advocating on the client's behalf.
- Identifies disabilities and limitations of his or her client, and obtains assessments and services to address needs.
- 16. Aggressively pursues alternatives to incarceration, assesses immigration and collateral consequences of a client's criminal conviction, acts to prevent such consequences, and explains the reason for any fines or penalties.
- 17. Relays to the client what criminal history information is being relied upon, makes sure the information is accurate, and sees that errors are corrected.
- 18. Accurately informs the client about sentencing, reviews the pre-sentence report with the client, makes sure the court removes any errors in the report, ensures that the client has a copy of the report, and files where appropriate a comprehensive defense pre-sentence memorandum.
- 19. Accurately informs the client who may be incarcerated about the incarceration process, including jail and prison programs, and works with the client to plan the future in terms of treatment while incarcerated, transitional issues, and reentry.

#### Client Feedback and Surveys

- Georgia State University School of Law, GA: A new project at the Georgia State University School of Law is taking a social science approach to improve the interaction between attorneys and clients by providing feedback from clients to attorneys on their communication skills.<sup>39</sup>
- Monroe County Public Defender Office, NY: The Monroe County Public Defender Office in New York instituted a client comment card system to solicit client feedback.
- Bronx Defenders, Bronx, NY: The Bronx Defenders administers a series of client surveys designed to find out what the office does well and what needs improvement.<sup>40</sup>

1 Robert D. Dinerstein, *Client-Centered Counseling:* Reappraisal and Refinement, 32 Ariz. L. Rev. 501, 504 (1990).

2 *Id*.

3 *Id*.

4 Id. at 506.

5 Id. at 507.

6 Id. at 506.

7 Jonathan E. Gradess, *Public Defense at the Crossroads: Listening to the Voice of Clients*, 2003 Drum Major Institute for Public Policy 3.

8 *Id*.

9 *Id*.

10 David R. Lynch, Effects on Public Defenders in General and On Their Relationships with Clients and Prosecutors in Particular, 26 Crim. Just. & Behav. 217, 225-30 (1999). 11 Marcus T. Bocaccini & Stanley L. Brodsky, Characteristics of the Ideal Criminal Defense Attorney From the Client's Perspective: Empirical Findings and Implications For Legal Practice, 25 Law & Psychol. Rev. 81, 91 (2001). 12 Gradess, *supra* note 7, at 2. 13 *Id*. 14 Dinerstein, supra note 1, at 507. 15 Id. at 518-19. 16 Id. 17 Id. 18 Id. at 507-08. 19 Id. 20 Id. 21 Id. 22 Id. 23 Id. 24 Dina F. Haynes, Client-Centered Human Rights Advocacy, 13 Clinical L. Rev. 379, 393 (2006-2007). 25 Dinerstein, supra note 1, at 509.

26 Id.

27 Id.

28 Id.

29 Gradess, *supra* note 7, at 5.

30 Michelle M. Thom, *Public Defense Hennepin County* (Office of the Public Defender Hennepin County-Fourth Judicial District, Minneapolis, MN) Fall 2005, at 2.

31 Haynes, *supra* note 24, at 391.

32 Christopher Muller, *The Case for Community Defense in New Orleans*, 2006 Brennan Center for Justice 22.

33 http://www.opd.state.md.us/index.html.

35 Jonathan E. Gradess, *Clients and the Client Community Deserve a Say in Defense Services*, 2001 Public Defense Backup Center Report 2.

36 Id.

37 Gradess, supra note 7, at 5.

34 http://www.gjp.org/about/board.

38 Client-Centered Representation Standards, (Client Advisory Board of the New York State Defenders Association New York, NY), July 25, 2005 at 1-2.

39 Muller, *supra* note 32, at 22-25.

40 Id.

#### Mental Health

#### Scenario 1

Helen J. is in her early thirties and lives with her mother and sister in a rent controlled apartment. Helen hears voices and at times believes she is someone else, problems her family say manifested about two years ago. Around the same time, Helen garnered the attention of the local police when she was repeatedly arrested for minor livability offenses, such as trespassing, loitering, and disorderly conduct. Month after month, the district attorney charged Helen with a different offense, and each time Helen pled guilty to time served. Two weeks ago, Helen was arrested downtown for public intoxication. Her public defender read the file and contacted the district attorney to work out a plea agreement. The district attorney offered the usual plea of guilty in exchange for a sentence of time served. Helen accepted the plea bargain and returned to the community without having her mental health evaluated. One month later, Helen was arrested for disorderly conduct in a park not far from her house.

#### Scenario 2

During the initial interview, the public defender representing Helen asks her a series of questions from an intake form developed by the office. He notices Helen's pattern of arrests and suspects her behavior results from untreated mental illness. During the initial interview, he asks Helen if she feels comfortable being interviewed by a social worker in the office. Helen consents to the interview and gives him permission to retrieve her mental health records from the state mental hospital. The social worker interviews Helen, determines that she suffers from schizophrenia, and suggests a local treatment facility. Helen, the public defender, and the social worker come to the decision that the community treatment center is the best option for her future. The social worker contacts the center and makes the necessary arrangements,

while the public defender takes this information to the arraignment hearing and argues that Helen's case be diverted on the condition that she attend the treatment facility. The judge and prosecutor agree to diversion and Helen's case will be dismissed if she successfully completes the treatment program. Currently, Helen is successfully completing her treatment protocol. She is taking her medication and her mom and sister say they can see glimpses of her old personality and, for the first time in a long time, they have hope for her future.

#### Issue

People with mental illness are falling through the cracks of our nation's social safety net and landing in the criminal justice system at an alarming rate. Five percentage of the U.S population has a mental illness. According to the U.S. Department of Justice, 16%, or almost two out of every ten inmates in U.S. prisons and jails have a serious mental illness.

## The Rise of Mental Illness in the Criminal Justice System

Actors in the criminal justice and mental health systems are in agreement that the increased contact between people with mental illnesses and the criminal justice system exacts a significant toll on the lives of people with mental illness, their families, and the community in general. Understanding why this problem has become so acute in recent years means understanding the dramatic shifts that occurred in mental health and criminal justice policy over the last few decades. The passage of the Community Mental Health Centers Act in 1964 caused a national shift from institutional to community-based care.<sup>3</sup> The result of this shift was the closure of large numbers of state mental institutions and the release of thousands of mental hospital patients, still suffering from mental illnesses, into neighborhoods around the country. In 1955, state mental hospital populations peaked at 559,000 people. By 1999, state mental hospital populations totaled fewer than 80,000.4 Mental health

service providers in the majority of these communities were not prepared to meet the increased demand for services. Moreover, many of the individuals released from mental health institutions into the community did not have any familial or social support to assist them in either obtaining treatment or reintegrating into society.

Changes in criminal justice policies have only compounded the problems associated with the shift from institutional to community-based mental health treatment. In recent years, many police departments have instituted "zero tolerance" policies, arresting people for offenses such as loitering, urinating in public, and disturbing the peace. 6 The majority of mentally ill individuals who are arrested are arrested for exhibiting the symptoms of untreated mental illness, which manifest as unacceptable anti-social behaviors. Many persons with mental illnesses also have a co-occurring substance abuse disorder, which increases the likelihood of contact with law enforcement. As legislatures increased the length of prison sentences for the possession or sale of some illegal substances, growing numbers of people with mental illness have been incarcerated for longer periods of time.8

Due to the increased contact between individuals with mental illness and the criminal justice system, tremendous demands have been imposed upon the criminal justice system. Every year, police departments spend thousands of hours transporting people with mental illnesses to hospitals and community mental health centers, only to have the institutions turn the individuals away or quickly return them to the streets. 9 Month after month, prosecutors may find themselves charging the same people with different public nuisance crimes, and each time the defendants with mental illnesses plead guilty to time served without having their mental health evaluated. 10 Every day, jails and prisons are swollen with people suffering from some form of mental illness. For example, on any given day, the Los Angeles County jail holds as many as 3,300 individuals with mental

illnesses, more than any state hospital or mental health institution in the United States. <sup>11</sup> Due to these circumstances, defender agencies are being forced to develop strategies to incorporate mental health issues into the provision of legal representation.

Without better mental health care, better partnerships and an improved focus in criminal justice, we can expect . . . inappropriate police encounters; unnecessary arrests and incarcerations; delayed release from jails and prisons; increased recidivism of persons with mental illness to the criminal justice system; and delayed or lack of needed mental health treatment.

—Mike Hogan, Director, Ohio Department of Mental Health and Chair, New Freedom Commission on Mental Health (2001)

#### Mental Illness and Indigent Defense

A number of major issues face defense attorneys. First, without system level screening procedures, an attorney may not know his or her client has a mental illness. To address this issue, a growing number of defender agencies are putting screening procedures in place and are providing attorneys with resources and expertise to help them deal with mental health issues.

Second, a defense attorney representing a client with a mental illness can face difficult decisions in determining what advice would be in the client's best interest. <sup>12</sup> On the one hand, the attorney has an obligation to mitigate the client's possible exposure to sanctioning by the criminal justice system. <sup>13</sup> To that end, the attorney may believe the best resolution of a case is a quick plea of guilty and acceptance of a short jail term. <sup>14</sup> On the other hand, the attorney may recognize that the client will continue to be rearrested

if his or her mental health needs are not addressed and that having a criminal record may make it more difficult for the client to obtain a job and to receive social services. <sup>15</sup> In that sense, the attorney may advise the client the best course of action is to get accepted into a pre-trial diversion program, where he or she would be under the supervision of the criminal justice system while in mental health treatment. <sup>16</sup> There is no right or wrong answer to these issues. Defense attorneys should present all possible consequences to their clients when discussing options for the resolution of the case.

Third, people with untreated mental illnesses are particularly vulnerable when incarcerated. <sup>17</sup> Predatory inmates and the prison and jail environment tend to exacerbate the symptoms of mental illness. <sup>18</sup> Consequently, their mental illnesses further deteriorate, prompting behavior and disciplinary infractions that result in more time spent in jail or prison. <sup>19</sup> For example, on Riker's Island, New York City's largest jail, the average stay for all inmates is 42 days, but for people with mental illnesses the average stay is 215 days. <sup>20</sup>

#### Issues Faced By Clients with Mental Illnesses

Due to the extent of these mental health problems, actors in both the criminal justice and mental health systems are becoming increasingly aware of the unique issues faced by people with mental illnesses in the criminal justice system. Some notable facts surrounding the issue include:

headlines and high profile incidents cause members of the public and some policymakers to incorrectly assume that the majority of people with mental illnesses commit violent crimes. <sup>21</sup> In actuality, the majority of people who are arrested and suffer from untreated mental illnesses are arrested for nonviolent offenses, such as trespassing or disorderly conduct. <sup>22</sup>

- by the escalating number of contacts between individuals with serious mental illnesses and the criminal justice system require a broad and comprehensive approach that should include mechanisms giving the police, prosecutors, defense attorneys, and judges effective options and alternatives to incarceration.<sup>23</sup>
- Disproportionate Representation in Prison and Jail: People with mental illness are significantly overrepresented in the criminal justice system. Approximately 5% of the U.S. population has a serious mental illness. Yet, according to the U.S. Department of Justice, 16% of the prison and jail population has a serious mental illness. According to the Council of State Government's Criminal Justice/Mental Health Consensus Project Report, national studies indicate that rates of serious mental illness among the U.S. prison population are at least three to four times higher than the rates of serious mental illness in the general population.<sup>24</sup> A five-year study conducted across 25 New York State counties found that men involved in the public mental health system were four times more likely to be incarcerated than men in the general population; for women, the ratio was six to one.25
- Recidivism of People with Mental Illness: Without adequate planning to transition inmates with mental illnesses back into the community, many will quickly return to jail or prison. In some jurisdictions recidivism rates for inmates with mental illnesses can reach over 70%.<sup>26</sup>
- Tremendous Cost to State and Local Budgets: The criminal justice system spends tremendous amounts of money arresting, prosecuting, and incarcerating people with mental illnesses.

  California spent approximately \$8.8 billion on criminal justice and corrections costs in 2007. As much as 20% of this budget, between \$1.2 and \$1.8 billion, was spent on offenders with mental

illness. Prison is a very costly and ineffective way to deal with mental health issues. Although there is some deviation from state to state, the average per-prisoner operation cost was \$23,876 in 2005. In comparison, the average operation cost for community mental health treatment was \$4,000 to \$7,000 in 1996. In King County, WA, the King County Department of Community and Human Services determined that in one year, 20 individuals cost the county approximately \$1.1 million in repeated stays in jails, hospitals, and detoxification centers. <sup>29</sup>

- Shift from Institutional Treatment to Community-Based Care: Over the last 50 years, the nation's public mental health system has shifted its emphasis from institutional care to community-based support for individuals with mental illnesses. In 1955, the population in state mental hospitals peaked at a combined 559,000 people. By 1999, this number declined to fewer than 80,000.<sup>30</sup>
- Dual Diagnoses/Co-occurring Disorders:
  Approximately 75% of people incarcerated with mental illnesses have co-occurring substance abuse disorders. This can have a negative impact on reentry planning for mentally ill offenders, because it is not unusual for community mental health providers to deny services to individuals with substance abuse disorders, especially if the individuals have drug convictions.<sup>31</sup>
- Lack of Affordable Housing: The lack of affordable housing options for individuals with mental illnesses compounds the difficulty of providing successful treatment. Without housing that is integrated with mental health, substance abuse, employment, and other services, many people with mental illnesses end up homeless and disconnected from community support. Most studies estimate that at least 20 to 25% of the single adult homeless population suffers from some form of severe and persistent mental illness.<sup>32</sup>

Poverty, Race, and Mentally Ill Offenders: Frequently, mentally ill offenders are the poorest and most disabled citizens in the community. In 1999, 38% of state and federal inmates with mental illnesses and 47% of jail inmates with mental illnesses reported being unemployed in the month before their arrests.<sup>33</sup> In addition, many are homeless or inadequately housed: 30% of jail inmates with mental illnesses and 20% of state prison inmates with mental illnesses reported living in a shelter in the 12 months prior to arrest. In many communities, people with mental illnesses are disproportionately people of color. A 1997 survey estimates that nearly 35% of the individuals receiving some form of mental health treatment (inpatient, residential, outpatient, etc.) were either black or Latino. Together, blacks and Latinos make up 28% of the general population.

In an effort to give mentally ill clients the best information to make the most informed decision about the resolution of a case, defense attorneys must be aware of the following:

1. The mental health conditions, histories, and needs of their clients as early as possible in the court process: After appointment, defense counsel should identify the clients with severe mental illnesses. This can be done by interviewing the client and reviewing the police report and the information obtained by the pre-trial services program. It is also important that defense counsel have speedy access to existing mental health information about the client. Information collected by law enforcement, pre-trial services and other justice agencies, or family members, should be made available to the defense as soon as the attorney is assigned or agrees to represent a client. At least one state, Georgia, has a statute that allows defense attorneys access to state mental health records with the consent of the client.34

- 2. The current availability of quality mental health resources in the community: Attorneys have a responsibility to know about the mental health resources in the community, both as to quality and availability. Defense counsel should know program admission criteria and requirements, required lengths of stay, confidentiality rules, clinical capabilities, availability, and cost. Finally, defense counsel should be aware of the qualitative performance of such programs. Obtaining this knowledge may require a steep learning curve for some defenders; as a result, indigent defense offices in several jurisdictions have staff that assist attorneys in finding appropriate alternatives.<sup>35</sup> In North Carolina, Sentencing Services, in conjunction with the Office of Indigent Defense Services, is developing an online searchable directory of treatment resources that indigent defense attorneys can use to identify available mental health treatment programs.
- 3. How current legislation and case law might affect the use of mental health information in the resolution of their client's case: An attorney has an affirmative obligation to be current on the laws that could affect his or her clients who have mental illnesses.

  Defense counsel must carefully consider how mental health information may potentially be used, not just in the instant circumstance, but in future hearings involving the client as well. 36

## Notable Approaches, Innovations, and Strategies

Criminal justice institutions around the country have responded to the increased contact of mentally ill people with the criminal justice system in a variety of new ways. Some notable initiatives include:

#### **A** New Model of Indigent Defense

The increased contact of people with mental illness with the criminal justice system has forced indigent defense agencies to develop new strategies to better serve mentally ill clients.

Some notable strategies include:

- Staff Social Workers in Public Defender Offices: In King County, WA, social workers are assigned to the public defender's office to help defense attorneys identify and develop mental health treatment alternatives to incarceration for defendants with mental illnesses.<sup>37</sup>
- Assessments by Mental Health and Social Work
  Staff: Prior to placing a client in the Broward
  County Mental Health Court, a public defender in
  Broward County, FL receives an assessment by
  mental health and social service personnel on
  staff with the public defender's office. The
  assessment occurs before the pre-trial release
  hearing and includes a listing of any medications
  that the defendant is taking, possible diagnoses,
  family support, social support, housing, and
  substance abuse issues.<sup>38</sup>
- Prompt Defense Attorney Assignment: In Hamilton County, OH, the Hamilton County Public Defender Office has made appointing attorneys to potentially mentally ill clients a priority and has set up procedures to expedite attorney appointment in order to facilitate clinical assessment and possible diversion as quickly as possible. In addition, the court has established a special afternoon calendar to entertain diversion proposals from the clients' defense attorneys.<sup>39</sup>

#### Partnerships Between Court Actors and Mental Health Services

- In Connecticut, the court and the Department of Mental Health and Addiction Services (DMHAS) formed a program that deploys mental health clinicians to each court to conduct on-site assessments shortly after arrest and to arrange for treatment in the community as a condition of pre-trial release. 40
- The sheriff in Seminole County, FL established a task force that meets monthly to discuss mental health multi-system coordination issues, as well as potential legislative proposals. The task force includes the prosecutor, the public defender, probation officials, representatives from the Seminole Community Mental Health Center, the judiciary, the County Commission, and various other stakeholders.<sup>41</sup>
- Release Plans: Mental health staff from the Connecticut Mental Health Center receive a list from the court each day of all individuals just arrested, which is cross-referenced with the center's database to see who is currently in their system. Staff then interview the defendants and, in coordination with the public defender and pre-trial services offices, develop a plan for their release. These plans are then submitted to the court.<sup>42</sup>

#### Resources

Defenders: In Georgia, much of the information regarding alternatives to incarceration for people with mental illness is catalogued by the Georgia Indigent Defense Counsel (GIDC), which serves as an information resource center for defense attorneys throughout the state. The GIDC provides defense attorneys with seminars and publications addressing the special needs of clients with mental illnesses. The GIDC is also available to defense counsel for telephone consultation on individual cases. 43

#### Criminal Justice System Partner Activities

Indigent defense is not the only actor in the criminal justice system that has grown increasingly concerned about the burgeoning number of mentally ill people entangled in the criminal justice system.

- Judges: In Lane County, OR, a mental health specialist trained to deal with co-occurring disorders was assigned by the Chief Superior Court Judge to the jurisdiction's drug court in the dual role of case manager and court liaison to assist people with co-occurring disorders who are placed in the drug court.<sup>44</sup>
- Prosecutors: In Pima County, AZ, the prosecutor uses information collected by the pre-trial services program to identify misdemeanor defendants who have mental illnesses and who might be candidates for pre-trial diversion. Those placed in the diversion program undergo a 180-day treatment program, and charges are dismissed upon successful completion of the program.<sup>45</sup>

4 *Id*.

<sup>1</sup> Criminal Justice/Mental Health Consensus Project, 2002 Council of State Governments xii.

<sup>2</sup> *Id.*; see also Lois A. Ventura et al., Case
Management and Recidivism of Mentally Ill Persons
Released From Jail, 49 Psychiatric Services, Oct.
1998, at 4 (examining the effect of community case
management on recidivism for jail detainees who have
mental illness and finding that, within 36 months, 188
of 261 subjects (72 %) were rearrested).

<sup>3</sup> Henry J. Steadman et al., *The Impact of State Mental Hospitals Deinstitutionalization on United States Prison Populations*, 1968-1978, 75 J. of Crim. Law & Criminology, 474-90 (1984).

5 Consensus Project, *supra* note 1, at 7.

6 Paula M. Ditton, *Mental Health Treatment of Inmates and Probationers*, 1999 Bureau of Justice Statistics 4.

7 Linda Teplin & Karen Abram, Co-Occurring Disorders Among Mentally Ill Jail Detainees: Implications for Public Policy, 1991 American Psychologist, at 1041.

8 Consensus Project, supra note 1, at 8.

9 Id. at xiii.

10 Id. at 4.

11 Editorial, *Treatment Not Jail: A Plan to Rebuild Community Mental Health*, Sacramento Bee, Mar. 17, 1999, § B, at 6.

12 Consensus Project, *supra* note 1, at 76.

13 Id.

14 Id.

15 Id.

16 *Id*.

17 The Impact of the Mentally Ill on the Criminal Justice System: Hearing Before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security (2000) (testimony of Reginald Wilkinson, then vice president, Association of State Correctional Administrators and director of Ohio Department of Rehabilitation and Correction).

18 Consensus Project, *supra* note 1, at xiv.

19 Id.

20 Fox Butterfield, *Prisons Replace Hospitals for the Nation's Mentally Ill*, N.Y. Times, Mar. 5, 1998 (citing the testimony of Dr. Arthur Lynch, director of Mental Health Services for the NYC Health and Hospitals Corporation, before the Subcommittee on Mental Health, Mental Retardation, Alcoholism and Drug Abuse Service on April 22, 1998).

21 Henry J. Steadman et al., Violence by People Discharged From Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods, 55 Archives of General Psychiatry, 1998, at 393-401; see also K.T. Meuser et. al., Trauma and Post-Traumatic Stress Disorder in Severe Mental Illness, 66 Journal of Consulting and Clinical Psychology, 1998, at 493-99.

22 Ditton, *supra* note 6, at 4 (according to the Bureau of Justice statistics, over one-quarter of the inmates with mental illnesses in local jails were incarcerated for public order offenses).

23 Id. at 4-5.

24 Consensus Project, *supra* note 1, at xii; *see also* Lois A. Ventura et al., *Case Management and Recidivism of Mentally Ill Persons Released From Jail*, 49 Psychiatric Services, Oct. 1998, at 1330-37.

25 Judith F. Cox et al., A Five-Year Population Study of Persons Involved in the Mental Health and Local Correctional Systems, 28 Journal of Behavioral Health Services & Research, May 2001, at 177-87.

26 Ventura et al., *supra* note 24, at 1330-37.

27 Jenifer Warren, *One in 100: Behind Bars in America 2008*, 2008 The Pew Charitable Trusts Public Safety Performance Project 11.

28 Sonja Shield, Addressing Gaps in Post Release Services for Offenders With Mental Illness: One

*Community's Response*, 3 Community Mental Health Report, Jan./Feb. 2003, at 17.

29 Consensus Project, *supra* note 1, at 13 (information provided by Patrick Vanzo, Section Chief, Crisis and Engagement Services, Mental Health, Chemical Abuse and Dependency Services Division, King County Department of Community and Human Services).

- 30 Steadman, supra note 3, at 480.
- 31 Teplin & Abram, supra note 7, at 1038.
- 32 Consensus Project, supra note 1, at 15.
- 33 Ditton, supra note 6, at 4.
- 34 Consensus Project, supra note 1, at 75.
- 35 Id.
- 36 Id. at 76.
- 37 Id.
- 38 Id. at 92.
- 39 Id. at 75.
- 40 Id.
- 41 *Id*. at 19.
- 42 Id. at 91.
- 43 Id. at 76.
- 44 Id. at 88.
- 45 Id. at 84.

## Marginalized and Underserved Populations

#### Scenario 1

Jamal B. is a 19-year-old single father of a beautiful daughter named Maya. The relationship between Jamal and Maya's mother did not work out, but Jamal is determined not to be a deadbeat dad. Jamal is employed at the J-Mart in the next county, about 40 miles from his home. His job at J-Mart allows Jamal to faithfully pay his child support, and next year Jamal is scheduled to enter the company's manager training program. Three months ago, on his way to work, Jamal got his third speeding ticket in as many months. As a result, Jamal's driver's license was revoked for one year. Jamal continued to drive his car because he had no other way to work and did not want to lose his job. Last week, Jamal was pulled over and arrested for driving while license revoked (DWLR). He was appointed a lawyer after his bond was set at \$1,200. Jamal could not pay the bond and he remained incarcerated until his next court date, which was three weeks later. Not surprisingly, Jamal lost his job at J-Mart. In addition, he was convicted of DWLR, which prohibited him from driving for an additional year. Jamal is now unemployed and looking for work in his old neighborhood, an environment plagued with crime and few employment opportunities.

#### Scenario 2

Six months prior to Jamal being arrested for DWLR, the Public Defender in the area met with some researchers at the local university. The purpose of the meeting was to develop a database to track the number of black and Latino clients that were being charged and convicted of DWLR. The Public Defender had a hunch that blacks and Latinos were disproportionately represented in this offense group. Moreover, the defender felt that this overrepresentation was mainly due to aggressive

police practices and the failure of minority groups to pay traffic fines in a timely manner because of a lack of resources. The collaboration between the Public Defender and the university led to the publication of a report, which detailed that blacks and Latinos were five times more likely to be stopped for speeding or some other minor traffic offense. Once these groups were stopped, police would discover they were driving without a license. The Public Defender shared these results with the County Sheriff, the District Attorney, and the Chief Superior Court Judge. As a result, the four actors worked together to develop new police policies concerning traffic stops and a diversion program for offenders charged with DWLR. In addition, a copy of the report was shared with the subcommittee on Justice and Public Safety at the State Legislature. Subsequently, the legislature passed a law requiring that racial impact statements accompany the introduction of any new crime bill. Six months later, Jamal was immediately diverted to the DWLR program when he was arrested. The program worked out a convenient payment arrangement for Jamal to pay off his old fines. In addition, Jamal was allowed to have a provisional license so he could get back and forth to work.

#### Issue

The American criminal justice system is regarded as one of the most equitable justice systems in the world. In this country, a criminal defendant is guaranteed the presumption of innocence, a trial by jury, and the right to counsel. These fundamental rights are so engrained in our culture that the majority of American citizens take them for granted. However, these constitutional guarantees are not always provided to every person that comes in contact with the criminal justice system. In fact, some participants in the criminal justice system are continually marginalized and underserved by law enforcement, the adjudicatory component, and corrections. In recent years, researchers have documented that women, the poor, and people of color frequently receive disparate treatment at different points on the criminal justice continuum. This

disparate treatment, and the inequities that may result from such treatment, has spurred various actors within the criminal justice system to work at solving the problems faced by underserved and marginalized populations.

## Notable Approaches, Innovations and Strategies

Throughout the country, system actors at various points in the criminal justice process are developing strategies to better serve marginalized populations by eliminating racial, gender, and socio-economic disparities. Some notable strategies include:

- Eliminating Bias in the Judicial System
- In Minnesota, the Fourth Judicial District conducted a pre-trial risk validation study. The goal of the study was to determine whether the Hennepin County pre-trial risk assessment scale effectively predicted a defendant's risk of pre-trial offending or failure to appear in court and to evaluate whether racial bias was inherent in any of the scale indicators. The risk assessment tool was first designed in 1992 and had never been statistically validated for accuracy in predicting the risk that defendants would offend or fail to appear in court if granted pre-trial release. In 2006, using rigorous statistical tests to validate the scale, researchers found that three of the nine indicators were correlated with race and were not significant predictors of pre-trial offending or failure to appear in court. As a result of the study, the Fourth Judicial District eliminated the three indicators that correlated with race and a new scale was developed.1
- Recently, the Minnesota Sentencing Guidelines Commission began the practice of sending racial impact statements to the author of each legislative bill. Racial impact statements present objective facts that explain how a proposed bill may affect

- some racial groups more than others. This is usually accomplished by examining the racial composition of the particular segment of state residents who are expected to be disproportionately affected by the legislation. This analysis informs consideration of alternatives that can enhance public safety without exacerbating racial disparity in the criminal justice system.
- Iowa and Connecticut have enacted legislation requiring that racial impact statements accompany proposed legislation.<sup>2</sup>
- In 1999, the Defender Association in Seattle received a grant from the Justice Department to establish a Racial Disparity Project (RDP). Since that time, the project has represented clients, conducted continuing legal education training, raised the level of discussion concerning racial disparity and race bias, and developed a partnership with the King County Prosecutor and the District Court to divert cases involving driving with a suspended license. An evaluation of the RDP conducted by the University of Minnesota Institute on Race and Poverty concluded that the project enables defenders to broaden their advocacy "to encompass not only representation of individual clients, but also efforts to change the system for the benefit of disadvantaged communities, and particularly communities of color."3
- In 2005, the Vera Institute of Justice started the Prosecution and Racial Justice Program (PRJ). PRJ is working in partnership with chief prosecutors in Milwaukee County, WI, Mecklenburg County, NC, and San Diego County, CA, to develop statistical tools and analytic protocols capable of identifying patterns that indicate when race or ethnicity have inappropriately influenced a prosecutor's decision. The program helps these offices adapt their electronic case management systems to track

and monitor critical variables and related indicators to detect racial disparities so the offices can determine whether racial bias was a factor. Early results from the Milwaukee County site show that the PRJ process can have a significant impact on racial disparity. For example, the PRJ process showed that junior prosecutors were filing drug paraphernalia charges (rather than declining prosecution) at a much higher rate against non-whites (in 73% of cases, compared to 59% in cases with white defendants). Consequently, the district attorney instituted a protocol that requires junior staff to stress diversion to treatment or dismissal and to consult with their supervisors prior to filing such charges.4

- The San Diego District Attorney's Office began an initiative to correct the problem of underrepresentation of people of color in the construction of the pool from which juries are empanelled. In January 2008, after defense attorneys representing a client in a death penalty case charged that Latinos were underrepresented by 50% in the jury pool in San Diego's downtown courts, the San Diego District Attorney filed a letter with the court requesting that immediate steps be taken to cure the defect in the juror summons process. San Diego's North County and South Bay judicial districts have large concentrations of jury-eligible Latino residents, but Latinos are underrepresented on downtown juries because fewer summonses are sent to these districts. As a result, prosecutors argued that the flawed process skewed the racial composition of the jury pool, causing fewer Latinos to be called for jury service compared to their proportion of the county population as a whole.<sup>5</sup>
- Through legal advocacy, the Metropolitan Public Defender Services in Portland, OR defeated a 15year-old city ordinance that excluded people from certain "Drug Free" zones of the city. The ordinance allowed police who arrested citizens for

- certain qualifying drug crimes to exclude the citizens from "any public right of way and park" for 90 days without trials or convictions and up to a full year if the defendants were later convicted. Defenders at the Metropolitan Public Defender Services brought repeated legal challenges to the ordinance, charging that it infringed on a broad range of fundamental constitutional rights. Moreover, defenders were able to show that the design as well as the manner of enforcement by the police resulted in racial disparity. As a result of the defenders' efforts, the mayor ordered a study to examine whether the charges of racial disparity were supported by police data. The study found that police enforcement practices produced sharp racial disparities, and the mayor decided to allow the ordinance to sunset.6
- The Kentucky Department of Public Advocacy (DPA), the statewide public defender system, developed the Litigating Race Education Manual. The manual was designed to: 1) train defense counsel to identify issues of racial bias or racial disparity at each stage of the criminal process; 2) explore how the policies, practices, and allocation of resources for the defense may contribute to racial disparities; and 3) advocate for appropriate corrective measures. The manual specifically addresses issues of racial profiling, immigration status and deportation, transfer hearings for juveniles, pre-trial release, and the jury issues addressed in Batson v. Kentucky, 476 U.S. 79 (1986). DPA introduced the manual in six training sessions for agency lawyers across the state and provided trainings for other defense lawyers through local bar associations. DPA also convened several regional education summits to discuss race and ethnicity in the criminal justice process.<sup>7</sup>
- Judge Sydney Hanlon of the Dorchester District Court in Boston encouraged a research study to determine if minority defendants were treated disparately at arrest, during charging, and in the

plea bargaining process. Judge Hanlon was particularly concerned that African American and Hispanic defendants in her court seemed much more likely than Caucasian defendants to be charged with drug-free school zone offenses, which require an automatic two-year mandatory minimum. At Judge Hanlon's behest, researchers from Northeastern University examined police records and found that, while roughly 80% of all drug arrests took place within a school zone, only 15% of whites were charged with an eligible offense (distribution or possession with intent), compared to 52% of nonwhite defendants. Judge Hanlon shared the research findings with Boston's police commissioner and the Suffolk County District Attorney's Office. Subsequently, the Northeastern University research team decided that, rather than publicly releasing the report, they would meet with police officials and prosecutors quietly over several months to discuss their findings and work with them to institute change.8

In September 2007, the Delaware Criminal Justice Council and the Delaware Supreme Court cosponsored a conference that convened criminal justice and community leaders from across the state to focus on strategies for improving racial and ethnic fairness in the state criminal and juvenile justice systems. More than 75 key stakeholders participated in the summit, including leadership from state government, courts, corrections, law enforcement, prosecution, defense, and community organizations. Summit participants focused on developing recommendations designed to enhance fairness in the areas of data collection, training, resources, and policy development. A report summarizing the group's recommendations was distributed to all attendees, all members of the Delaware Criminal Justice Council, and all members of the General Assembly.9

#### Expanding Programs to Serve Underserved Populations

To address the particular reentry needs of Minnesota's female offenders, including collateral consequences, the William Mitchell College of Law, in collaboration with the Minnesota Department of Corrections and the state public defender's office, established a Reentry Clinic for women in January 2008. The new clinic uses a traditional law school clinic model, which allows student certified attorneys, supervised by a clinic director, to represent a small number of individual clients. In the clinic's course component, students learn about civil litigation and discuss prison and reentry issues. Beyond the legal issues, the Reentry Clinic uses a unique and effective holistic approach to assist clients with additional non-legal reentry needs. For example, each client in the clinic is provided a free credit report to determine if any outstanding bills are owed. In addition, the clinic assists clients in resolving any outstanding court fines that are affecting their driver's license status. While there are two other reentry clinics in the country, one in New York and one in Maryland, the Reentry Clinic at William Mitchell College of Law is the only one exclusively for female former offenders.<sup>10</sup>

<sup>1</sup> Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers, 2008 The Sentencing Project 31.

<sup>2</sup> *Id*. at 45.

<sup>3</sup> http://www.defender.org/projects/rdp.

<sup>4</sup> http://www.vera.org/otherwork/prj.html#.

<sup>5</sup> Reducing Racial Disparity, *supra* note 1, at 31.

<sup>6</sup> *Id.* at 39.

7 The Advocate: The Journal of Criminal Justice Education & Research, (Kentucky Department of Public Advocacy, Louisville, KY), May 2008, at 3.

8 Reducing Racial Disparity, *supra* note 1, at 45.

9 http://cjc.delaware.gov/PDF/Delaware%20summit %20report%20111307.pdf.

10 Joanna Woolman, *The State of Reentry: A Program to Ease into Life at William Mitchell College of Law*, 30 Cornerstone 2 (2008).

#### Cultural Competence

#### Scenario 1

Ayumi Z. is a 25-year-old Myong woman who was recently arrested for stabbing her husband. Ayumi's public defender attempted to conduct an initial interview, but Ayumi refused to answer any of his questions. In fact, during the interview Ayumi retreated to the corner of the room when the defender attempted to approach her to show her some pictures of her apartment. The defender wants to get the criminal charge against Ayumi dropped to a lesserincluded offense, but she has completely rebuffed his attempts to communicate with her. During their final jail visit together, the defender becomes completely frustrated with Ayumi's uncooperativeness and informs her that, based on the little information she has given, her only option is a plea bargain. Ayumi agrees to accept a plea bargain and is now serving 60 months in prison.

#### Scenario 2

After Ayumi refused to answer any of the defender's questions during the initial interview, he seeks some advice on how to proceed from a social worker in the public defender's office. The social worker reminds the defender of the lessons they learned during the office training on cultural competence. During the training, they were taught that women, especially some Asian women who have suffered domestic abuse, tend to withdraw from and fear other male figures. She suggests that the defender allow one of the female lawyers in the office to accompany him and ask most of the questions during the interviews with Ayumi. The defender follows her advice and is amazed to see Ayumi open up with the female lawyer. Subsequently, the attorneys learn that Ayumi has suffered egregious sexual and domestic abuse at the hands of her husband for many years. They use this information to negotiate a plea agreement with minimal jail time and treatment for Ayumi.

#### Issue

The United States is a heterogeneous society that is rapidly becoming even more diverse. Lawyers play a critical role in our society. Therefore, it is imperative that defense attorneys are able to effectively counsel clients from diverse backgrounds.<sup>2</sup> To facilitate this crucial component of client-centered counseling, legal scholars and other social scientists have encouraged lawyers to be trained to deliver "culturally competent services." Culture is commonly defined as a body of values, customs, and ways of looking at the world shared by a common group of people.<sup>4</sup> Cultural groups can be based on a variety of characteristics, including ethnicity, race, gender, nationality, age, economic status, social status, language, sexual orientation, immigration status, and religion.<sup>5</sup> Given the multiplicity of factors that shape a cultural group, defense attorneys must be cognizant that a wide range of influences may impact the attorney-client relationship. 6 Moreover, lawyers must embrace the idea that no single characteristic will completely define the lawyer's or client's culture.7 Failure to train indigent defense attorneys in how to have positive cross-cultural interactions with their clients threatens to perpetuate the alienation and bewilderment about the legal system that indigent clients frequently experience.8

For a defense attorney, the ability to deal with differing cultures is a fundamental skill at the heart of client-centered representation. If a defense attorney fails to develop this skill, several aspects of the attorney/client relationship can be negatively impacted, including:

Forming Trusting Relationships: Indigent defense attorneys and their clients face special challenges in developing relationships in which genuine and accurate communication can occur. Teaching attorneys concepts like "insider" and "outsider" status may help explain why some lawyers and clients experience difficulties in building relationships in which advice is accepted and

information is exchanged freely. When the client's culture fosters a significant distrust of outsiders or of the lawyer's particular culture, the lawyer must work especially hard to earn trust in a culturally sensitive way.<sup>11</sup>

- Evaluating Credibility: In examining the credibility of a story, lawyers often ask whether the story makes sense. Lawyers and clients who have different time and space orientations may have difficulty understanding and believing each other. For example, a lawyer whose culture is oriented to hour, day, month, and year may incorrectly interpret a client as untruthful if the client cannot tell a linear time-related story. Another common example involves eye contact. In some cultures, looking someone straight in the eye is a statement of open and honest communication, while avoiding eye contact signals dishonesty. In other cultures, avoiding eye contact can be a sign of respect. Attorneys need to recognize how cultural differences can manifest themselves and plan for a representation strategy that takes them into account.12
- Fact Gathering: Cultural differences often cause us to attribute different meanings to the same set of facts. One important goal of cross-cultural training is to help attorneys make isomorphic attributions (i.e., to attribute to behavior and communication that which is intended by the actor or speaker). Lawyers who are taught about the potential for misattribution can develop strategies for checking their interpretations. Inaccurate attributions can cause lawyers to make significant errors in their representation of clients. Imagine a lawyer saying to a client, "If there is anything that you do not understand, please just ask me to explain," or "If I am not being clear, please just ask me any questions." The lawyer might assume that a client who does not ask for clarification understands what the lawyer is saying. However, many cultural differences may explain a client's reluctance to either blame the

lawyer for poor communication (the second question) or blame himself or herself for a lack of understanding (the first question). Clients from some cultures might find one or the other of these results to be rude and therefore will feel reluctant to ask for clarification for fear of offending the lawyer or embarrassing themselves.<sup>13</sup>

#### Elements of Culturally Competent Services

A new generation of legal clinicians has recognized the importance of preparing lawyers to interact with culturally different clients. Most notably, Professors Susan Bryant and Jean Koh Peters have outlined five key habits that lawyers should develop to become culturally competent.<sup>14</sup>

- Habit One: Degrees of Separation and Connection—Habit One provides attorneys a framework within which to analyze questions regarding how similarities and differences between the lawyer and client may influence lawyer/client interactions, especially information gathering. Habit One asks attorneys to list and diagram similarities and differences between themselves and their clients and then explore the significance of these similarities and differences. By asking attorneys to recognize similarities, the Habit focuses lawyers on the connections they have with their clients. 15 By asking attorneys to identify differences, the Habit focuses lawyers on the possibility that cultural misunderstanding, bias, and stereotyping may occur.
- Habit Two: The Three Rings—Habit Two asks attorneys to identify and analyze the effects of cultural similarities and differences on the interaction between the client, the legal decisionmaker, and the lawyer. After identifying and analyzing this information, Habit Two links this analysis to the Habit One analysis to explore all of the ways in which culture may influence a case. In pinpointing and recording similarities and

- differences in the legal system-client dyad, attorneys are asked to identify the cultural similarities that may establish connections and understanding, as well as the cultural differences that may lead to different values or biases and cause legal decision-makers to negatively judge the client.<sup>16</sup>
- Habit Three: Parallel Universe—Habit Three teaches attorneys a method for exploring alternative explanations for client behavior. This Habit invites attorneys to look for multiple interpretations, especially at times when the lawyer is judging the client negatively. The point of Habit Three is to encourage the lawyer to become accustomed to challenging herself to identify the many alternatives to the interpretations to which she may be tempted to leap based on insufficient information. By engaging in "parallel-universe" thinking, lawyers are less likely to assume that they understand the reasons for client behavior. Moreover, paralleluniverse thinking allows the lawyer to ask, "I wonder if there is another piece of information that, if I had it, would help me interpret what is going on?"17
- Habit Four: Pitfalls, Red Flags and Remedies— The first three Habits focus on incorporating cross-cultural knowledge into how attorneys think about cases, their clients, and the usefulness of the legal system. Habit Four focuses on crosscultural communication. The Habit identifies some tasks in the normal attorney-client interaction that may be particularly problematic in cross-cultural encounters. In addition, Habit Four encourages culturally sensitive exchanges with clients by identifying four areas on which lawyers should focus carefully: (1) scripts, especially those describing the legal process; (2) introductory rituals; (3) client's understanding; and (4) culturally specific information about the client's problem.18

Phabit 5: The Camel's Back—Habit Five encourages attorneys to become aware of their own biases and stereotypes. First, the Habit encourages the attorney to create settings in which bias and stereotype are less likely to govern. Second, the Habit promotes reflection and change of perspectives with a goal of eliminating bias. Like the proverbial straw that breaks the camel's back, Habit Five recognizes innumerable factors that interact with bias and stereotype to negatively influence an attorney-client interaction.<sup>19</sup>

## Notable Approaches, Innovations and Strategies

Throughout the country, indigent defense agencies and other criminal justice stakeholders are developing strategies to handle criminal cases in a more culturally competent manner. Some of the most notable strategies include:

#### Using Interpreters

Due process requires that parties to court actions be able to understand and comprehend the proceedings fully. In addition, it is important that clients and witnesses be able to communicate fully with attorneys during case preparation. As a result, indigent defense offices have started employing interpreters so attorneys can communicate with their clients and practice law in a more culturally competent manner.

The Rhode Island Office of the Public Defender (RIPD): RIPD employs two full-time interpreters, primarily for Spanish-speaking clients. Conversations and courtroom proceedings are interpreted when clients and/or witnesses do not comfortably communicate in English. When clients and witnesses speak other languages, the RIPD contracts with outside agencies to provide interpreters in the clients' or witnesses' native languages for courtroom and out-of-court conversations.<sup>20</sup> Mecklenburg County Public Defender Office,NC: In North Carolina, the Mecklenburg County Public Defender Office is pilot-testing having a Spanish interpreter on staff. Public defenders in other judicial districts across the state have access to interpreters through the Administrative Office of the Courts.

#### Providing or Requiring Training

- Wisconsin State Public Defender Office: The Office of Training and Development within the Wisconsin State Public Defender Office conducts cultural competency training for its staff and other members of the criminal justice system.<sup>21</sup>
- Rhode Island Office of the Public Defender (RIPD): This indigent defense agency has made cultural diversity training mandatory for employees. In addition, RIPD allows its employees to take intensive Spanish language courses to better serve the large number of Spanish-speaking clients.<sup>22</sup>

#### Programs for Specific Cultural Groups

Native Americans and Peacemaking Circles: Peacemaking circles are used in many indigenous tribes in North America. The use of peacemaking circles for structuring communication and decision-making in diverse cultures is an ancient tradition. Circles have been found to be an effective approach to involving community members in the process of holding local offenders accountable for repairing the harm they caused, assisting crime victims, and fostering a greater sense of connectedness among all those affected by crime within the community. The first pilot project in the U.S. began in Minnesota with the Mille Lacs Band of Chippewa Indians, the Mille Lacs County District Court, and the Minnesota Department of Corrections. Since that project, several urban, suburban, and rural communities in Minnesota have developed circles to meet the unique cultural needs of a diverse population.<sup>23</sup>

#### Educational Programs

Equal Justice and Racial Fairness Forums: In Minnesota, the 1<sup>st</sup> Judicial District Equal Justice Committee and the Minnesota Judicial Branch Racial Fairness Committee sponsored a forum on racial fairness and how the growing minority community perceives the criminal justice system.

A Minnesota survey on the court system, which was one factor that led to holding the forum, found that only 23% of African Americans in Minnesota expressed confidence in the court system and that the confidence rate among whites was barely above 50%. <sup>24</sup> Dakota County Judge Joseph Carter, who chaired the committee that cosponsored the forum, stated,

We should be disturbed by that. If you were facing a system where you felt you stood a good chance of being treated unfairly, you wouldn't want anything to do with it.<sup>25</sup>

Attendees developed strategies to reduce the problems between the district's minorities and the judicial system and to improve citizens' perception of the system. Some of the strategies developed in the forum included:<sup>26</sup>

- Increase the level of cultural awareness training received by law enforcement officers, to reduce the likelihood of racial profiling;
- Initiate periodic days in which citizens can clear misdemeanor bench warrants from their records in exchange for reduced sentences; and
- Increase the percentage of minority officers to match the changing face of the district's citizenry.

1 Marjorie A. Silver, *Emotional Competence*, *Multicultural Lawyering and Race*, 3 Fla. Coastal L.J. 219, 229 (2002); *see also* Burnele V. Powell, *Somewhere Farther Down the Line: MacCrate on Multiculturalism and the Information Age*, 69 Wash. L. Rev. 637, 640 (1994) (citing census projections predicting majority of U.S. workers by 2010 to be persons of color); SYMPOSIUM: Session 3: *Mobilizing Creative Problem Solvers*, 37 Cal. W.L. Rev. 83, 94 (noting that the population will reach close to 40% persons of color in next 30 to 50 years).

2 Ascanio Piomelli, *Cross-Cultural Lawyering By the Book: The Latest Clinical Texts and a Sketch Of a Future Agenda*, 4 Hastings Race & Poverty L.J. 131, 133 (Fall 2006).

3 See, e.g., Susan Bryant, The Five Habits: Building Cross-Cultural Competence in Lawyering, 8 Clinical L. Rev. 33 (2001) (describing approach developed with Jean Koh Peters); Silver, supra note 1; Paul R. Tremblay, Interviewing and Counseling Across Cultures: Heuristics and Biases, 9 Clinical L. Rev. 373 (2002) (proposing use of heuristics, i.e., tentative generalizations, concerning areas in which standard client-centered model may not fit clients from diverse cultures, while also urging lawyers to develop self-awareness of their own cultural backgrounds and biases); Carwina Weng, Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness, 11 Clinical L. Rev. 369 (2005).

4 Bryant, supra note 3, at 41.

5 *Id*.

6 Piomelli, supra note 2, at 133.

7 Bryant, supra note 3, at 41.

8 Piomelli, supra note 2, at 133.

9 Bryant, supra note 3, at 40.

10 *Id*.

11 Id. at 42.

12 Id. at 43.

13 Id.

14 Bryant, *supra* note 3, at 64.

15 Id. at 64-65.

16 Id. at 68.

17 Id. at 70.

18 Id. at 72.

19 Id. at 76.

20 http://www.ripd.org/Organization/interpreters.htm.

21 http://www.doa.state.wi.us/docview.asp? docid=6530&locid=0.

22 http://www.ripd.org/Organization/interpreters.htm.

23 http://www.doc.state.mn.us/rj/documents/Peacemakingcircles.pdf.

24 Dan Heilman, *First District in Minnesota Struggles with Tensions Between Minorities*, The Minnesota Lawyer, Sep. 29, 2008 at 1-2.

25 Id. at 1.

26 Id. at 1-2.

# Part II.3: Using the Court System to Improve Client Outcomes

The primary objective of any indigent defense agency is to obtain the best outcome for the client. In recent years, a number of indigent defense agencies have used traditional and non-traditional court processes to achieve better results for their clients. This section discusses the innovative ways indigent defenders use these court processes to help their clients.

- A. Pretrial Release
- B. Problem Solving Courts
- C. Diversion
- D. Mediation
- E. Adjudication Partnerships

## Pretrial Release

#### Scenario 1

Rebecca L., a 24-year-old single mother of two children, is arrested and charged with shoplifting and providing false information to the police. Two days after her arrest, Rebecca appears before a magistrate who sets the conditions for pretrial release. Rebecca is not represented by counsel at this appearance and the magistrate sets bond at \$1,500 without any background information on Rebecca's ties to the community or financial resources. Rebecca works as a grocery store clerk and struggles to provide for her family. She is not able to scrape up ten percent of her bond amount in order to secure release through a bail bondsman. Rebecca's next court appearance is two weeks away and she will lose her job if she misses work for that long. In addition, the rent for her apartment is due and her children are in the custody of a local social services agency.

### Scenario 2

Prior to her appearance at the bond hearing, Rebecca is interviewed by a third year law student working as an intern with the Public Defender Office. The intern is able to gather vital background information about Rebecca's residence, employment, and criminal history. The assistant public defender assigned to the case uses this information at the bail hearing to persuade the magistrate that Rebecca is neither a flight risk nor a threat to public safety. As a result, Rebecca is released on her personal recognizance. She is able to maintain her job and apartment and her children avoid a stint in the foster care system.

#### Issue

The right to pretrial release is a fundamental liberty interest rooted in the notion that one is presumed innocent until proven guilty beyond a reasonable doubt. Once an individual is arrested and taken into

custody, he or she can solicit the court to be released either on personal recognizance or by posting bail. "Release on personal recognizance" is defined by the Uniform Rules of Criminal Procedure to mean the release of a defendant without monetary conditions under an order to appear at a given time. Release by bail refers to the security or bond given by the accused to ensure society's interest in having that person answer to a criminal prosecution.

The purpose of pretrial release is to ensure the presence of the accused when directed by the court, while allowing the defendant to be released pending trial.<sup>4</sup> In addition, freedom prior to trial gives the pretrial detainee the opportunity to prepare a defense unhampered. Pretrial release also prevents the infliction of punishment prior to conviction.<sup>5</sup>

## Current Indigent Defense Practices Regarding Pretrial Release

Although the United States Supreme Court has acknowledged that a defendant's right to counsel includes the pretrial period "from arraignment until the beginning of trial," only eight states and the District of Columbia currently provide a statutory right for counsel's assistance at the bail stage. As a result of this policy choice as well as other factors, most indigent defendants are not represented by counsel when bail is initially set in state courts, even though the need for and benefits of such representation have been articulated by scholars, practitioners, and the American Bar Association (ABA).

Public interest in pretrial release procedures, particularly bail, came to the forefront in 1963 when Attorney General Robert F. Kennedy delivered a comprehensive report to Congress on the federal bail system. The report detailed how the use of money bail and dependence on bail bondsmen disadvantaged poor people because most detainees remained incarcerated solely due to their inability to afford bail. The report highlighted that, at the typical bail

hearing, the accused appeared without counsel, which invariably disadvantaged the defendant, because the judge did not receive vital information concerning the defendant's personal background and financial resources. 11 Consequently, the report characterized the lack of legal representation at bail hearings as a "prejudice of defendants' rights" and recommended that legal counsel be guaranteed to the accused at this crucial stage. 12

In the wake of the report, Congress attempted to transform the nation's federal pretrial release system by passing the Federal Bail Reform Act of 1966. The 1966 Act presumed pretrial release for most defendants and limited the use of monetary bail. Moreover, Congress concluded that "proper respect for law and order is jeopardized when the disposition of justice turns upon the financial status of the accused."

Nearly twenty years later, Congress revisited bail reform by passing the Bail Reform Act of 1984. <sup>16</sup> This Act empowered judges to deny bail to defendants who had been accused of committing serious crimes while on pretrial release for unrelated charges. <sup>17</sup> The 1984 Act also prohibited the use of high bail to detain an otherwise bail-eligible defendant and maintained the overall directive that judges use non-financial conditions of pretrial release for most defendants awaiting trial. <sup>18</sup>

After the enactment of the Federal Bail Reform Acts, many states reformed their pretrial release systems to favor non-financial supervised release. However, the overwhelming majority of states have yet to adopt the recommendations of the Kennedy report and guarantee the assistance of counsel at the bail hearing. <sup>19</sup>

## The Benefits of Pretrial Release

The ABA, in a resolution from its Criminal Justice Section, stated "counsel's representation at the bail hearing is important to protect the individual's liberty interest... The pro se incarcerated defendant, who has been incarcerated for hours and sometimes days, is unable to effectively present the most persuasive argument in favor of pretrial release. A lawyer, on the other hand, fully appreciates the nature of the expedited bail proceeding, and can provide the committing magistrate with corroborated information about the accused, including residence, employment, and prior criminal history. The lawyer also can propose more favorable bail alternatives, assist in explaining the procedures for posting bail, and expedite the release process."<sup>20</sup>

Proper respect for law and order is jeopardized when the disposition of justice turns upon the financial status of the accused.

— Michael M. O'Hear, Plea Bargaining and Procedural Justice: Taking the Punishment out of the Process

Attorneys are more effective at making the case for pretrial release than the client is alone. The benefits of having legal representation at the bail stage are numerous and include:

- A greater chance the client will be released on personal recognizance rather than bail;
- Reduced bail amounts;
- Protecting the client's right to due process;
- Increased efficiency in the court system;
- Reductions in jail overcrowding;
- Cost savings to local governments due to reductions in the jail population;
- Mitigation or eradication of procedural injustices, such as when clients lose their jobs, housing, or custody of their children;

- Clients released prior to trial are likely to have more favorable case dispositions than clients who are incarcerated pretrial; and
- Increased likelihood that case dispositions will be based on actual guilt or innocence rather than the socio-economic background of the defendant.

A number of studies have provided statistical evidence that having attorney representation at the bail stage is more effective for clients. For example, the Lawyers at Bail Project (LAB) in Baltimore, MD has documented the results of their program, which provides legal counsel to suspects at bail hearings. Under the LAB program:

- When nonviolent offenders had legal counsel at bail hearings, judges were two and a half times more likely to release the accused on personal recognizance, compared to cases of arrestees without counsel.<sup>21</sup>
- Bail was reduced for one in every two represented clients, compared to one in seven unrepresented clients.
- When bail was reduced, represented clients were able to secure greater reductions than detainees who were on their own. On average, judges decreased bail for represented detainees by \$1,000, compared to just \$166 for unrepresented detainees.<sup>22</sup>
- Defendants secured pretrial release more quickly. The median time spent in jail for LAB clients was two days, compared to nine days for the unrepresented control group of clients.<sup>23</sup> Additionally, being granted pretrial release more quickly helps defendants retain jobs and financial security while they wait for trial.

Studies also have shown that legal representation at the bail stage protects the due process rights of defendants. Moreover, a Superior Court criminal case decided in New Jersey in 1990 cited studies conducted in Philadelphia, New York, and Washington, DC that revealed that incarcerated defendants are more likely to be convicted and receive harsher sentences than individuals who are released pending trial.<sup>24</sup>

Legal representation at the bail stage also improves court efficiency and reduces costs to taxpayers. Early representation by defense counsel identifies for the court individuals who are eligible for pretrial release more effectively and more quickly, which reduces jail populations and frees up limited jail space for those who require pretrial detention. For example, before LAB, the pretrial population at the county jail was 1,211, nearly 50% greater than the maximum capacity of 811. By August 1999, one year after LAB was initiated, the pretrial jail population was reduced in half, from 1,211 to 620, and remained at that level throughout the life of LAB. LAB secured the release of defendants more quickly, which also generated more taxpayer savings.

Because pre-trial punishment falls equally on the innocent and guilty, innocent people inevitably are punished as if they are guilty.

— Michael M. O'Hear, Plea Bargaining and Procedural Justice: Taking the Punishment out of the Process

Reductions in pretrial jail populations mean reductions in county jail operating costs. Nationally, the cost of holding a person in pretrial detention is approximately \$50 per day per person.<sup>26</sup> Therefore, initiatives such as LAB can mean substantial savings for local governments.

Lack of representation at the bail stage results in many accused individuals spending substantial time in jail on charges that are later dismissed, not prosecuted, or reduced to lesser included offenses. <sup>27</sup> In Maryland, between 1995 and 1996, more than half of all arrests, or 178,935 cases, resulted in dismissal or were placed on the inactive calendar and not prosecuted. <sup>28</sup> Providing legal representation earlier in the criminal process can help weed out inappropriate charges and free up court dockets, as well as limited prosecution and court resources, for the more serious cases.

### Pretrial Release and the Determination of Guilt

Pretrial incarceration increases the likelihood that innocent persons will plead guilty to crimes they did not commit because financially they cannot afford to prolong their incarceration.<sup>29</sup> The studies conducted in Philadelphia, New York, and Washington, DC documented the strong relationship between pretrial detention and unfavorable dispositions for defendants.<sup>30</sup>

Prolonged pretrial incarceration can have a tremendously negative impact on the life of a pretrial detainee. When defendants undergo prolonged pretrial incarceration, loss of employment is often the result. In addition, the accused and their families often face eviction or foreclosure of a home due to the loss of the detainee's income. Finally, the children of an incarcerated single parent may be displaced to the foster care system.

Research shows there are similar social costs associated with the bail system. A study on the Pretrial Release Project, conducted by the University of Maryland School of Law, found that low-income defendants who were granted bail typically secured bail by using the services of a bail bondsman. Bail bondsmen guarantee the court the full amount of the bail. In exchange, clients pay bail bondsmen 10% of the full bail amount. Individuals who provide the court the full bail amount directly are given a full refund when they appear in court. In contrast, the 10% down

payment to a bail bondsman is non-refundable. The Maryland study found that 70% of interviewed arrestees reported that the expense of the bondmen's fee resulted in delays in paying rent and utility bills and in buying less food.<sup>31</sup>

For those who cannot make bail the unpleasantness of pretrial detention may be a very effective deterrent to trial.

— Michael M. O'Hear, Plea Bargaining and Procedural Justice

## Notable Approaches, Innovations and Strategies

Pretrial release increases the likelihood that the criminal disposition will be based on the defendant's guilt or innocence, rather than his or her economic and family concerns. Consequently, some criminal justice researchers believe instituting attorney representation at the bail stage is one of the most important system reforms indigent defense could implement.

Some of the most notable programs and reforms include:

## Legal Reform

Kentucky Legislation: Legislators in Kentucky created a statewide pretrial release program that requires defendants to be released on recognizance or an unsecured collateral bond, unless a judge determines they are flight risks. Representatives from the pretrial services agency, a division of the Kentucky Administrative Office of the Courts, are available 24 hours a day, seven days a week. When court is not in session, pretrial representatives call judges at their homes and request release on nonfinancial conditions.

Kentucky's pretrial release agency has been extremely effective in reducing the state's pretrial detention population while ensuring that defendants appear in court. In fiscal years 1999 and 2000, only 10% of Kentucky defendants failed to appear in court when required, which is a significant improvement when compared to the national failure to appear rate of 21% in 2004.<sup>32</sup>

- Bail Hearing Statutory Guarantees: California, Connecticut, Delaware, Florida, Massachusetts, North Dakota, West Virginia, Wisconsin, and the District of Columbia have granted statutory guarantees to legal representation at bail hearings.<sup>33</sup>
- Bail Review Hearing Representation: In 1997, the Maryland State Bar Association, led by the Section on Correctional Reform, endorsed a resolution to guarantee representation at Maryland bail review hearings. During the 1998 General Assembly session, the Bar Association also sponsored statewide legislation that included a provision to provide additional funding for public defender offices so they would have the staff to represent indigent clients at bail hearings. Unfortunately, the bill failed to survive a vote in the Maryland House Judiciary Committee.<sup>34</sup>

### Innovative Approaches

A number of jurisdictions have developed innovative approaches to providing representation for pretrial release, including:

- Replacing the private bail bonding system with a court operated system;
- Partnering with law school clinics to provide representation at bail hearings;
- Partnering with law school interns to provide representation at bail hearings; and
- Obtaining private foundation money to provide funding for pretrial release programs.

Private Bail Bond System with a Court Operated System: Twenty-two states have replaced the professional bail bonding system with a court operated refundable cash deposit system. Under this new system, the defendant pays a percentage of the bond amount to the court, which refunds this amount when the case concludes. These systems have proven to be successful. In 1999, in 24 of Maryland's 33 reported district court locations, defendants that posted refundable cash bonds with the court appeared for subsequent court appearances at a higher rate than defendants released on bail bond. 35

In Oregon, judges have been directed to base pretrial release on a defendant's employment status, financial circumstances, family relationships, and residence. Under the new program, the accused is presumed to be entitled to release on recognizance and then to conditional release. If circumstances require a financial bail, an automatic 10% refundable cash deposit to the court is available to defendants.<sup>36</sup>

Partnering with Law School Clinics to Provide Representation at Bail Hearings: The University of Maryland School of Law started the Access to Justice and Bail Clinic to provide legal representation to indigent defendants at bail review hearings. In 1998 in Maryland, detainees who lacked representation at bail hearings were typically being incarcerated for 30 to 45 days waiting for their next court date. To resolve the situation, students in the law clinic now interview clients in detention facilities and later represent them at bail review hearings. The legal representation provided by the clinic has achieved proven results. 70% of the law student's clients were released on either personal recognizance or by reducing bail to an affordable amount.<sup>37</sup>

Partnering with Law School Interns to Provide Representation at Bail Hearings: In Minneapolis, MN, the Minnesota Public Defender Office uses certified student attorneys in their third year of law school to argue conditions of release at bond hearings. The students are part of a structured internship program in which they receive training on the standards for pretrial detention and courtroom advocacy. Students are assigned cases under the supervision of a senior attorney and their duties include gathering information on the client's background, sustaining client contact with incarcerated defendants, and arguing conditions of release at bail hearings. The internship program has been successful in guaranteeing a right to counsel at the bail stage as well as in engendering client trust and cooperation early in the representation.

In Massachusetts, public defenders represent the accused for bail purposes in felonies and use a mix of private attorneys and law students to provide counsel in misdemeanors.<sup>38</sup>

- Poblaining Private Foundation Money to Provide Funding for Pretrial Release Programs: In 1998, the Abell Foundation, a private foundation in the Baltimore area, funded the Pretrial Release Project (PRP) and the Baltimore Lawyers at Bail Project (LAB) after the Maryland State Bar Association requested that the Maryland Court of Appeals authorize a study to evaluate the entire bail review process. The pilot program set up a clinical study, including a control group, to provide statistical outcome measures. As reported in detail earlier in the report, clients represented by LAB attorneys:<sup>39</sup>
  - Were more likely to be released on their own recognizance;
  - Had greater reductions in their bail amounts; and
  - Served, on average, less time in jail.

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1 Ray v. State, N.E.2d 1364 (Ind. Ct. App. 1997).
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2 Unif. R. Crim. P. 314(a).

3 8A Am. Jur. 2d Bail and Recognizance § 1 (2008).

4 *Id*. at § 2.

5 Id. at § 11.

6 Powell v. Alabama, 287 U.S. 45, 57 (1932).

7 Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right To Counsel At Bail Proceedings*, U. Ill. L. Rev. 1, 4 (1998).

8 See generally The Pretrial Release Project: A Study of Maryland's Pretrial Release and Bail System, 2001 The Abell Foundation; Colbert, supra note 7; Report to the House of Delegates Recommendation, 1998 A.B.A. Crim. Just. Sec.; Douglas L. Colbert et al., Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail, 23 Cardoza L. Rev. 1719 (May 2002).

9 The Pretrial Release Project, supra note 8, at 5.

10 Id.

11 *Id*.

12 Id. at 6.

13 Id. at 8.

14 Id. at 9.

15 Bail Reform Act, 18 U.S.C. § 3142 (1964).

16 The Pretrial Release Project, supra note8, at 8.

17 Id.

18 Id. at 9.

19 Id. at 11.

- 20 Report to the House of Delegates Recommendation, 1998 A.B.A. Crim. Just. Sec. 2.
- 21 The Pretrial Release Project, *supra* note 8, at ii n.7.
- 22 Id. at 4.
- 23 Colbert et al., supra note 8, at 1738-39.
- 24 Colbert, *supra* note 7, at 3; *see also* A.B.A. Standards Relating to Pretrial Release at 3 (1968) (studies conducted in Philadelphia, New York, and Washington DC, demonstrated a strong relationship between detention and unfavorable disposition).
- 25 The Pretrial Release Project, supra note 8, at 4 n.6.
- 26 Colbert, supra note 7, at 14.
- 27 *Id.* at 41 (for example, in Maryland in 1995-1996 more than half of Maryland's 178,935 arrests resulted in dismissal or were placed on the inactive calendar and not prosecuted).

28 Id.

- 29 Brenda S. Blackwell & Clark D. Cunningham, Taking the Punishment out of the Process: From Substantive Criminal Justice Through Procedural Justice to Restorative Justice, L. & Contemp. Probs., 2004, at 60-64.
- 30 Colbert, supra note 7, at 21 n.27.
- 31 The Pretrial Release Project, *supra* note 8, at 52.
- 32 Id. at 12.
- 33 Colbert, supra note 7, at 22 n.35.
- 34 Colbert et al., *supra* note 8, at 1731.
- 35 The Pretrial Release Project, *supra* note 8, at 11, 47.
- 36 Id. at 13.

- 37 Colbert et al., *supra* note 8, at 1736-37.
- 38 Colbert, supra note 7, at 22 n.35.
- 39 Colbert et al., supra note 8, at 1756.

### Problem-Solving Courts

#### Scenario 1

Robin S. is a 32-year-old mother of two small children. Over the course of three years she has managed to support her family and maintain her grocery store job even though she is addicted to methamphetamine. Last week she was arrested for possession of methamphetamine near her home. Robin was assigned a public defender who is very familiar with drug cases. The defender met with Robin and explained that in these types of cases he is normally able to negotiate plea bargains with the prosecution for a nominal amount of jail time and probation. During her time in custody, Robin came to the realization that she must kick her drug habit for the welfare of her children. This realization led Robin to ask the defender if the stipulations of the plea bargain will mandate that she seek treatment for her addiction. The defender responded that the local court system does not have a drug court program. He subsequently negotiated a plea bargain of 30 days in jail and two years probation. Robin served the brief sentence and was released. Two months later, Robin was arrested again for possession of methamphetamine. This time her girls were in the car, and they could potentially be placed in foster care as a result of Robin's arrest.

### Scenario 2

During the second meeting with Robin, her public defender details all of the potential ways the case could be resolved. One potential avenue of case resolution is for Robin to enter the county's drug court program. To enter the program, Robin would have to plead guilty to the offense and fulfill several substance abuse treatment requirements. The defender takes the time to explain the advantages and disadvantages of drug court and lets Robin make the decision whether she wants to pursue that course of action. Robin chooses to plead guilty to the charge and enter drug court. She has faced some challenges and methamphetamine is a tough drug to quit, but she is two months away from completing an 18-month program.

#### Issue

In recent years, problem-solving courts have emerged as a viable alternative to traditional criminal courts.<sup>1</sup> Traditional criminal courts rely on the adversarial process to resolve disputes between the state and the accused.<sup>2</sup> In contrast, problem solving courts work collaboratively with prosecutors, public defenders, probation officers, social workers, and other justice system actors to develop strategies that will address the underlying social problems facing defendants, victims, and their communities.<sup>3</sup>

Roger Warren, president emeritus of the National Center for State Courts, provides a succinct summary of the differences between traditional and problemsolving courts in the table on the following page.<sup>4</sup>

# Drug Courts: The Most Prominent Example of Problem-Solving Courts

The most well-known and researched example of problem-solving courts is drug court. Drug courts represent the coordinated efforts of the judiciary, prosecution, defense, probation, law enforcement, mental health, social service, and treatment communities to actively break the cycle of substance abuse, addiction, and crime.<sup>5</sup> The first drug court opened in Dade County, Florida in 1989. By the end of 2004, there were 1,621 drug court programs in the United States, with another 215 in the planning stages. Drug courts identify substance-abusing offenders and place them under strict court monitoring and community supervision. Participants go through an intense regimen of substance abuse and mental health treatment, case management, drug testing, and probation supervision, while attending regularly scheduled status hearings before a judge with expertise in the drug court model.<sup>8</sup> From the earliest evaluations, researchers have determined that drug courts provide closer and more comprehensive supervision than traditional criminal courts. 9 More importantly, research has shown drug use and criminal behavior have been substantially reduced while offenders participate in drug court.<sup>10</sup>

Traditional Process	Problem-Solving Process
Dispute resolution	Problem-solving dispute avoidance
Legal outcome	Therapeutic outcome
Adversarial process	Collaborative process
Claim- or Case-Oriented	People-Oriented
Rights-based	Interest- or needs-based
Emphasis placed on adjudication	Emphasis placed on post adjudication and alternative dispute resolution
Interpretation and application of law	Interpretation and application of social science
Judge as arbiter	Judge as coach
Backward-looking	Forward-looking
Precedent-based	Planning-based
Few participants and stakeholders	Wide range of participants and stakeholders
Individualistic	Interdependent
Legalistic	Common sense
Formal	Informal
Efficient	Effective

The 10 key components of the drug court model include:<sup>11</sup>

- Drug courts integrate alcohol and other drug treatment services with justice system case processing.
- Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.

- 3. Eligible participants are identified early and promptly placed in the drug court program.
- Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.
- 5. Abstinence is monitored by frequent alcohol and other drug testing.
- 6. The court responds to participant noncompliance with a series of structured sanctions that become progressively more serious.
- 7. Ongoing judicial interaction with each drug court participant is essential.
- Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.
- Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations.
- Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.

## The Leading Benefits of the Drug Court Model Include:

- Decreased Criminal Recidivism: The largest statewide study on drug courts to date was released in 2003 by the Center for Court Innovation (CCI). The study analyzed the impact of the New York State drug court system and found that the re-conviction rate for 2,135 drug court participants was 29% lower than the rate for similar offenders who did not enter drug court.<sup>12</sup>
- Increased Retention in Treatment: The length of time a patient spends in treatment is a reliable predictor of post-treatment performance. In short, the longer a patient stays in drug treatment the better the outcome. Unfortunately, 80 to 90% of drug treatment clients drop out in fewer than

- twelve months. In contrast, drug courts report retention rates between 67% and 71%. Over two-thirds of participants who begin treatment in a drug court complete the program in one year.<sup>13</sup>
- Costs Savings: A study conducted by the National Institute of Justice in Multnomah County, OR estimated the drug court model saved an average of \$2,328.89 per year per participant compared to conventional criminal court. The study also estimated the costs associated with crime victims. When cost savings from reduced recidivism were included, total cost savings averaged \$3,596.92 per client. Over a 30-month period, drug court saved an average of \$5,071.57 per client.

## Problem-Solving Courts and Indigent Defense

In problem-solving courts, the role of the indigent defense attorneys is different. In a traditional court, the primary functions of indigent defense attorneys are to protect the clients' legal rights and to avoid or minimize the clients' loss of liberty. In problemsolving courts, however, defense attorneys advocate for case resolutions that address the root causes of clients' criminal behavior. A key goal of problemsolving justice and whole-client representation is to figure out why the client came into contact with the criminal justice system in the first place. This goal is not effectuated by the indigent defender alone. The defense attorney is part of a team with the court, prosecution, treatment provider, and correctional officials. This team-oriented approach changes the traditional responsibilities of the defense attorney. A few of these additional responsibilities include:

Best Interests vs. Express Interests: Defenders in problem-solving courts should not make decisions about clients' participation in a program, even though doing so may seem to be in the best interest of the clients. Defenders should provide thorough advice about the program, listing the pros and cons, and let the clients express their interests.

- Extra-Legal Issues: Defenders must be cognizant of extra-legal issues that contribute to clients' negative behavior. For example, homelessness or financial instability may be major factors in a client's substance abuse problem.
- Knowledge of Treatment Options: Defenders must be aware of different treatment options so their clients can be provided with the best information to make the most informed decisions.

## Notable Approaches, Innovations, and Strategies

The success of the drug court model led the Conference of Chief Justices and the American Bar Association to adopt resolutions calling for expansion of the drug court model into other populations of offenders. <sup>16</sup> The following provides examples of other problem-solving courts that have emerged.

Juvenile Drug Court (JDC): A JDC handles selected delinquency cases with youth who have problems with alcohol and/or other drugs. The JDC judge maintains close oversight of each case through regular status hearings and serves as team leader over representatives from treatment, juvenile justice, social and mental health services, school and vocational training programs, law enforcement, probation, prosecution, and the defense. The team meets frequently to address substance abuse issues, as well as any related problems with the youth and his or her family. For example, the Baltimore JDC is a four-phase intervention program for juveniles between the ages of 13 and 17 who have been charged with crimes other than violent crimes or sexual offenses. Youth are screened for eligibility based on their need, potential commitment to the program, and past delinquency histories. Participation is voluntary and requires a commitment by a parent or guardian to participate and attend court hearings as well. JDC involves

- frequent court appearances, close court supervision, random drug testing, and individual and group-based counseling.<sup>17</sup>
- Homeless Court Program (HCP): The Homeless Court Program is a special Superior Court Session for homeless defendants—convened in a homeless shelter—to resolve outstanding misdemeanor offenses and warrants. The HCP builds on partnerships between the court, local shelters, service agencies, homeless participants, the prosecutor, and the public defender. Homeless court works to resolve the problems that homelessness represents with practical solutions. Initial referrals to the HCP originate in shelters and service agencies. The HCP is designed for efficiency; the majority of cases are resolved in one hearing. In 1999, the first homeless court was established in San Diego as an outgrowth of San Diego's Veteran's Stand-Down Program. Deputy Public Defender Steve Binder of the San Diego Public Defender's Office played an instrumental role in the development of the initial homeless court. According to Binder, the idea for the HCP grew out of his frustration from continually representing homeless clients for offenses such as "disturbing the peace" and "illegal lodging." The San Diego Homeless Court meets monthly at Saint Vincent de Paul, San Diego's largest homeless shelter.
- Family Dependency Treatment Court (FDTC): A
  FDTC is a juvenile or family court docket that
  focuses on abuse, neglect, and dependency cases
  where parental substance abuse is a primary
  factor. Judges, attorneys, child protection
  services, and treatment personnel unite with the
  goal of providing safe, nurturing, and permanent
  homes for children, while simultaneously
  providing parents the support and services to
  become drug and alcohol free. FDTCs aid parents
  in regaining control of their lives. They promote
  long-term stabilized recovery to enhance the
  possibility of family reunification within

- mandatory legal timeframes. In North Carolina, participants are provided a court-based case manager who ensures parents receive treatment and other needed services. Participants must submit to frequent and random urinalysis and/or breathalyzer tests to monitor drug and alcohol use. Participants must attend and participate in treatment and are required to complete other educational programs as prescribed by the court and the Department of Social Services (DSS). Currently, FDTCs are operating in Mecklenburg, Durham, Buncombe, Cumberland, Halifax, Orange, and Wayne counties. <sup>18</sup>
- DWI/Drug Court: A DWI/Drug court is a distinct court system dedicated to changing the behavior of the alcohol- or drug-dependent offender arrested for driving while impaired (DWI). The goal of the DWI/Drug court is to protect public safety by attacking the root cause of DWIs, as well as alcohol and other substance abuse. The DWI/Drug Court utilizes a team approach that includes prosecutors, defense attorneys, probation, law enforcement, and alcohol/drug treatment professionals. This approach includes identification and referral of participants early in the legal process to a full continuum of drug/alcohol treatment and other rehabilitative services. Compliance with treatment and other court-mandated requirements is verified by frequent alcohol/drug testing, close community supervision, and interaction with the judge in non-adversarial court review hearings. One example of a DWI/Drug Court can be found in New Mexico. New Mexico's DWI/Drug Court Program is a voluntary program. However, participants who are in non-compliance with any aspect of the program incur sanctions, which can include loss of program points, increased treatment services, having to repeat all program activities, and jail time. Since its inception, more than 400 impaired driving offenders have participated in the program. Of total participants, 250, or 63%, successfully completed all program

- activities. The program averages a retention rate of 70% and a 9.6% recidivism rate for impaired driving offenders in Bernalillo County, NM.<sup>19</sup>
- Reentry Drug Court (RDC): RDCs use the drug court model to facilitate the reintegration of druginvolved offenders into communities upon release from correctional facilities. Upon release, the offender is involved in regular judicial monitoring, intensive treatment, community supervision, and regular drug testing. RDC participants are provided with specialized services needed for successful reentry into society. Since 1993, Delaware's RDC has overseen the reentry of offenders with serious substance abuse problems. The program focuses on good case management as the offender moves from a prison-based therapeutic community into a halfway house or intensive outpatient treatment program. The program serves to prevent gaps in treatment as the participants move from one program to the next. The Delaware RDC has been in operation for three years. Since its inception, the number of drug offenders entering prison has been reduced by more than 10%.<sup>20</sup>
- Tribal Healing to Wellness Court (THWC): A THWC is a component of the tribal justice system that adapts the wellness court concept to meet the specific substance abuse needs of each tribal community. It provides an opportunity for each Native American community to address the devastation of alcohol and other drug abuse by establishing more structure and a higher level of accountability for these cases. THWC participants undergo comprehensive supervision, drug testing, treatment services, immediate sanctions and incentives, team-based case management, and community support. In Minnesota, THWCs use a non-adversarial, community-based system to treat and heal members of the tribal community who break tribal laws and abuse alcohol and other drugs. Through an intensive program, which can last from nine months to two years, a team

- consisting of tribal judges, advocates, prosecutors, police officers, substance abuse and mental health professionals, elders, traditional healers, educators, and the tribal community provide the structure and accountability for the program.<sup>21</sup>
- Reentry Court (RC): RCs are specialized courts that develop reentry plans for parolees to reduce recidivism and improve public safety through judicial oversight. RC responsibilities generally include: (1) reviewing offenders' reentry progress and problems; (2) ordering offenders to participate in various treatment and reintegration programs; (3) the use of drug and alcohol testing, and other checks, to monitor compliance; (4) the application of graduated sanctions to offenders in non-compliance with treatment requirements; and (5) providing modest incentive rewards for sustained clean drug tests and other positive behaviors. Judge Brigitte Fortune presides over the Harlem Parole RC, a component of the Harlem Community Justice Center. This court helps parolees returning to the Harlem community make the transition from life in prison to responsible citizenship. Parolees are linked to a wide range of social services, including drug treatment, transitional employment and vocational services, and health care and mental health treatment. Where appropriate, these services are offered to family members to increase stability in the home. Participants are required to return to court frequently to meet with case managers and parole officers and to appear before an administrative law judge, who closely monitors participant compliance with court orders. The goal is to prevent parolees from re-offending by helping them find jobs and assume familial and personal responsibilities.<sup>22</sup>
- Campus Drug Court (CDC): CDCs are quasijudicial drug court programs, within the construct of a university disciplinary process, which focus on students with substance-abuse-related

disciplinary cases that would otherwise result in expulsion from college. CDCs provide structured accountability while simultaneously rehabilitating the students. The goal of CDCs is to decrease substance abuse in a group not normally reached by traditional interventions on campus. The Day IV program, based at Colorado State University, is the first CDC in the country. Instead of suspending or expelling students who violate the school's code of conduct, students are given a deferred dismissal in exchange for following a strict set of program rules, which include alcohol and drug abstinence and regular meetings with a team of social workers and a hearing officer. After a minimum of four months of participation, the student can be restored to regular status. If the student fails to complete the program, he or she is formally expelled.<sup>23</sup>

- Community Court (CC): CCs are usually located in communities where quality of life crimes, such as prostitution, illegal vending, graffiti, shoplifting and vandalism, are committed. These courts have the bifurcated goal of solving the problems of defendants appearing before the court while using the leverage of the court to encourage offenders to give back to the community. Launched in 1993, the Midtown CC in New York works with low-level offenders who are sentenced to community service. The court assists clients with the problems that underlie their criminal behavior and works in partnership with local residents, businesses, and social service agencies in order to organize community service projects and provide on-site social services, including drug treatment, mental health counseling, and job training.<sup>24</sup>
- Mental Health Court (MHC): A MHC is a special court for people with psychiatric disabilities who have been charged with crimes. The purpose of the court is to deal with crime in a way that addresses the person's mental health needs. MHCs focus on the mental disability rather than the criminal behavior. Treatment, medical care

- and supervision, case management, and service referral are the primary ingredients of MHCs. On February 17, 1999, King County, WA instituted a specialized MCH. The project was created to serve the community by addressing public safety, reducing criminalization of persons with mental illness, and promoting integration between the criminal justice and mental health systems. The project goals are to process cases faster, improve access to public mental health treatment services, improve client well-being, and reduce recidivism.<sup>25</sup>
- Teen Court (TC): Teen Court is a program run by teens for teens. The underlying philosophy of the program is that positive peer pressure from other teenagers will help prevent youth recidivism and that youth are more receptive to consequences handed down from their peers. Youth who commit minor offenses such as petty theft, possession of alcohol, or disorderly conduct are sentenced by juries of their peers in teen court. Law enforcement officers, probation officers, teachers, and others may refer youth to these voluntary programs. TCs alleviate some of the strain on the regular court system and have been implemented in over 400 communities since the first TC opened in Odessa, TX. Knox County TC, in Galesburg, IL, was established to give youthful offenders a chance to clear arrests from their permanent records by performing community service and other duties ordered by the court. Teen offenders must admit their guilt and agree to accept sentences given to them by juries of their peers.<sup>26</sup>
- Domestic Violence Court (DVC): A felony DVC is designed to address traditional problems of domestic violence, such as failure to report incidents, withdrawn charges, threats to victims, lack of defendant accountability, and high recidivism, through intense judicial scrutiny of the defendant and close cooperation between the judiciary and social services. A permanent judge works with the prosecution, assigned victim

advocates, social services, and a defense attorney. In addition, a case manager ascertains victim needs and monitors cooperation by the defendant. The Brooklyn Felony DVC, which opened in June 1996 in New York, adjudicates all indicted domestic violence felonies in the borough of Brooklyn. A dedicated court team including judges, attorneys, victim advocates, and a resource coordinator ensures that defendants are carefully monitored, victims have access to comprehensive services, and judges have the information they need to make quick and effective decisions.<sup>27</sup>

1 Victor E. Flango, Future Trends in State Courts 2007: Problem Solving Courts Under a Different Lens, 2007 National Center for State Courts 1.

2 Id. at 2.

- 3 Donald J. Farole et al., *Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts*, 26 Just. Sys. J., 2005, at 57.
- 4 Flango, *supra* note 1, at 2-3.
- 5 C. West Huddleston, III et al., *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States*, 2004 Nat'l Drug Ct. Inst. 1.
- 6 Flango, supra note 1, at 1.
- 7 Huddleston, *supra* note 5, at 1.

8 *Id*.

9 *Id*.

10 Id.

- 11 Id. at 5.
- 12 Amanda Cissner et al., *Drug Courts an Effective Treatment Alternative*, 19 Crim. Just., 2004, at 2.

- 13 Huddleston, supra note 5, at 4.
- 14 Shannon Carey & Michael Finigan, A Detailed Cost Analysis in a Mature Drug Court Setting: A Cost-Benefit Evaluation of the Multnomah County Drug Court, 2003 NPC Research, Inc., at 3.

15 *Id* at III.

16 Id. at 5.

- 17 http://www.baltimorecountymd.gov/Agencies/circuit/ family/juvdrugcourt/history.html.
- 18 http://www.nccourts.org/Citizens/CPrograms/DTC/Family/Default.asp.
- 19 http://www.nhtsa.dot.gov/people/outreach/safedige/spring2001/sp01-17.html.
- 20 http://courts.delaware.gov/courts/superior%20 court/pdf/?Reentry\_France\_27Mar03.pdf.
- 21 http://www.mncourts.gov/?page=1735.
- 22 http://www.courtinnovation.org/index.cfm/fuseaction/Page.viewPage/pageId/595.
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- 24 http://www.courtinnovation.org/index.cfm? fuseaction=Page.ViewPage&PageID=591&currentTo pTier2=tru.
- 25 http://www.metrokc.gov/kcdc/mhhome.htm.
- 26 http://library.thinkquest.org/2640/htmldocs/introduction/intro.html.
- 27 http://www.courtinnovation.org/index.cfm/fuseaction/Page.viewPage/pageId/599.

#### Diversion

#### Scenario 1

Jenny S. is a 19-year-old college student who got introduced to methamphetamine as a way to stay up and study all night for her college finals. Two months after being introduced to the drug, Jenny finds herself in the clutches of addiction. In fact, she has started stealing to support her burgeoning drug habit. One afternoon, Jenny is in the local Talmart looking to steal some goods that she can trade for drugs. The store security sees her place three CDs in her backpack and calls the police. Jenny is arrested and charged with shoplifting. The public defender handling Jenny's case quickly explains the punishment associated with a conviction and encourages Jenny to plead guilty because the store security tape clearly shows her stealing the merchandise. Jenny pleads guilty to the charge and is sentenced to probation and community service, but her underlying drug addiction remains unresolved. Two months later, Jenny is arrested again for possession of methamphetamine. This drug arrest places her at risk of losing her college financial aid.

### Scenario 2

During the initial interview, the public defender assigned to Jenny's case notices that she is underweight and fidgety. He asks if she has ever experimented with drugs or alcohol. Jenny admits that she uses methamphetamine and explains that her addiction led to the shoplifting. She goes on to say that she wants to quit using drugs, but does not think she can do so on her own. The public defender tells Jenny that she may be a candidate for the county's first offender diversion program. He explains the program will require Jenny to attend a 12-month drug treatment program, which is longer than the traditional court supervision associated with the crime. However, he goes on to explain that if she successfully completes the treatment program the

criminal charge will be dismissed. Jenny seems to really want to get better and she realizes that her future is bleak if she continues to use drugs. Moreover, her future employment chances are much better without a criminal conviction on her record.

Therefore, Jenny agrees to participate in the diversion program and is on her way to getting her life back on track.

#### Issue

Diversion is a broad term that refers to a wide array of criminal justice initiatives, such as intensive supervisory probation, coerced abstinence, and specialized courts. Generally, diversion has been defined as the avoidance of full prosecution through a screening process, which may occur before or after the filing of the criminal charge. The term also has been used to refer to a defendant's avoidance of more punitive sanctions, such as imprisonment or parole revocation following a conviction. Diversion programs are a means to address the needs of defendants who have underlying problems that contribute to their criminal behavior.

The table on the following page shows the differences between diversion programs and drug courts.<sup>5</sup>

Most diversion programs utilize an assessment process to determine the defendant's needs, develop an intervention plan for that defendant, and contract with the defendant to delineate the requirements of the program and the criminal justice outcomes of success. Scholars have suggested that diversion programs have five principal goals:

- Avoidance of the negative labeling and stigmatization of having a criminal conviction;
- Reduction of unnecessary social control and coercion due to less contact with courts;
- Reduction of recidivism;
- Provision of client services; and
- Reduction of justice system cost.

How Traditional Diversion Models and Drug Court Compare (By the National Association of Drug Court Professionals)		
Drug Court	Traditional Diversion	
Integration of substance abuse treatment with justice system case processing.	The processing of the case is suspended during treatment.	
Use of a nonadversarial approach, in which prosecution and defense promote public safety while protecting the right of the accused to due process.	Prosecution and defense may work together to admit defendant to diversion; the case is then taken out of the adversarial process.	
Early identification and prompt placement of eligible participants.	This is also a goal of diversion – standards call for identification and placement shortly after formal filing of charges and assignment of attorney.	
Access to a continuum of treatment, rehabilitation, and related services.	Defendants should have access to the services they need to address underlying problem.	
Frequent testing for alcohol and illicit drugs.	This can be part of the diversion plan as well if alcohol or drug use is involved.	
A coordinated strategy among the judges, prosecution, defense, and treatment providers to govern offender compliance.	Program compliance is turned over to diversion program staff and treatment providers. The prosecutor's only involvement after placement is to decide whether charges should be dismissed based on program performance.	
Ongoing judicial interaction with each participant.	There is little, if any, judicial interaction with the participant.	
Monitoring and evaluation to measure achievement of program goals and gauge effectiveness.	This is done as well, by diversion program staff.	
Continuing interdisciplinary education to promote effective planning, implementation, and operation.	The interdisciplinary interaction may not match the level present in specialty courts in some jurisdictions.	
Partnerships with public agencies and community- based organizations to generate local support and enhance drug court effectiveness.	This should occur with traditional diversion programs.	

Law enforcement and the prosecution have always had discretion regarding whether to arrest and charge people suspected of criminal activity. However, prior to the 1970s there were few formal diversion programs in operation in the U.S. Interest in diversion as a dispositional alternative for criminal defendants increased after the U.S. President's Crime Commission issued a report in 1967, *Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society*, which called for the expanded use of pretrial diversion. Subsequently, two federal agencies, the Manpower Administration of the U.S. Department of Labor and the Law Enforcement Assistance Administration of the U.S. Department of Justice funded pretrial diversion programs in several sites over

multiple years.<sup>11</sup> As a result of their success, many states passed legislation establishing pretrial diversion as a dispositional option and professional associations, like the National Association of Pretrial Services Agencies (NAPSA), came into existence and developed standards to help diversion programs become more successful.<sup>12</sup>

Generally, there are three types of diversion initiatives:<sup>13</sup>

- Pre-arrest;
- Pretrial; and
- Post-conviction intervention.

### **Pre-arrest Diversion Programs**

Pre-arrest strategies focus on police officers, since they are the first line of response to crisis situations. <sup>14</sup> Pre-arrest diversion strategies are designed to minimize the use of traditional criminal justice pathways and usually involve a scenario where police officers advise, order, and even transport suspects to treatment or intervention programs. <sup>15</sup> Although pre-arrest diversion programs often help clients, indigent defense practitioners should be aware of some potential drawbacks to this approach, which include: <sup>16</sup>

- It relies on law enforcement officers to make quick judgments about suspects' suitability for treatment.
- It is open to discriminatory behavior and other abuses of authority stemming from broad police discretion.
- There can be due process concerns, since clients lack defense counsel at this stage.

The major advantage of pre-arrest diversion is that it offers the earliest intervention opportunity for the client and the greatest potential for minimizing unnecessary costs to the criminal justice system. <sup>17</sup> Pre-arrest diversion has become a popular method of therapeutic diversion for low level-offenders with mental health issues. <sup>18</sup> Typically, mental health pre-arrest diversion programs are implemented in one of three ways: <sup>19</sup>

- Police-Based Specialized Response
   Programs: These types of programs are located within the police department and involve sworn officers who have been given specialized mental health training.
- Police-Based Specialized Mental Health
   Response: These types of police programs
   employ mental health professionals to
   provide on-site and telephone consultations
   to police officers in the field.

• Mental Health-Based Specialized Mental Health Response: This is the traditional approach, where, as part of a partnership or cooperative agreement with the community mental health system, the police are part of a mobile crisis team with mental health specialists.

## **Pretrial Diversion Programs**

Traditionally, pretrial diversion programs engage after suspects have been arrested, but some programs may occur prior to the filing of formal charges.<sup>20</sup> Usually, these programs work as follows:

- Shortly after arrest, the diversion program identifies a defendant who meets the eligibility requirements for admission to the program.<sup>21</sup>
- 2. The matter is then brought before a prosecutor, who must agree to diversion placement before the defendant can be accepted in the program.<sup>22</sup>
- If the defendant is placed in the program, the prosecution of the case is held in abeyance for a specified period while the defendant undergoes treatment.<sup>23</sup>
- If the defendant completes treatment or another intervention designed to reduce the likelihood of recidivism, the charges are dismissed.<sup>24</sup>
- 5. If the defendant fails to successfully complete the diversion program, the case is placed back on the court docket and prosecuted normally.<sup>25</sup>

## National Association of Pretrial Services Agencies (NAPSA) Standards for Diversion Programs

The Standards developed by the NAPSA state the following practices define a successful pretrial diversion program:<sup>26</sup>

- The program offers people charged with criminal offenses an alternative to the traditional criminal justice process.
- Participation by the accused is voluntary.
- The accused has access to defense counsel prior to the decision to participate in the program.
- Participation occurs no sooner than the filing of formal charges and no later than a final adjudication of guilt.
- The program develops with the defendant a service plan that addresses the needs of that defendant and is structured to assist that person in avoiding future arrests.
- Completion of the diversion program by the participant results in the dismissal of charges.

### Post-Conviction Diversion Programs

A number of potential diversion options are available to offenders after conviction. These options include:<sup>27</sup>

- Court-ordered referral to treatment after trial but before judgment is rendered, whereby successful program participation might result in dismissal of the charges.
- Pre-sentence intervention to refer a defendant for treatment or supervision after conviction. If the defendant successfully completes the program, the court can sentence the defendant to probation or conditional discharge.
- Suspension of sentence pending treatment completion. Upon successful completion of

- treatment, the court would re-sentence the defendant to a non-incarcerative sentence or not execute the sentence.
- Probation sentence with a treatment requirement.
   This option includes intensive probation
   supervision programs, which often include urine testing but do not necessarily involve drug treatment. If the defendant drops out of treatment or otherwise violates treatment conditions, a violation of probation occurs.
- Split sentence of jail and treatment. In this option, a short jail term is followed by mandated treatment participation, with a return to jail if treatment is not successful.
- Other sentence combined with treatment, whereby the court imposes a combination of nontraditional sentences, such as community service or restitution combined with treatment enrollment.
- Post-incarceration review. Once participation in a prison treatment program is successfully completed, the court will follow up with a postincarceration review hearing. Alternatively, the client can submit a defense motion for a reduction in jail or prison time in order to enroll in treatment under parole supervision.

## Notable Approaches, Innovations and Strategies

Across the country, indigent defense agencies are utilizing innovative diversion programs and strategies to achieve dispositional outcomes that address the most pressing needs of their clients. Some of the most notable programs and strategies include:

### Mental Health Diversion Programs

The Memphis Police Department's Crisis
Intervention Team (CIT) is an example of a
police-based specialized response program, which
uses a team approach. The team is staffed by

police officers with specialized training in mental health issues. Officers receive training from mental health providers, but the key to the program's effectiveness is a partnership between the police department and a psychiatric emergency center. A recent study concluded that the Memphis CIT program has a low arrest rate for mental health crisis calls, a high rate of use by patrol officers, a rapid response time, and frequently leads to referrals for treatment.<sup>28</sup>

The Charlottesville Crisis Intervention Team (CIT) in Charlottesville, VA is a successful model of positive police interaction with people experiencing acute episodes of mental illness. The goal of the Charlottesville CIT is to reduce unnecessary restraint and incarceration of people with mental illness and to provide individuals with appropriate treatment in the community. The key to the success of the Charlottesville CIT was the formation of a task force consisting of representatives from law enforcement agencies, mental health service providers, community corrections, defense attorneys, and prosecutors.<sup>29</sup>

## Diversion Programs through Specialized Courts

Diversion programs include specialized courts. Since the establishment of the first drug court in 1989, the number and types of specialty courts has grown dramatically. By 2004, there were 1,621 drug courts in existence as well as 937 specialty treatment courts, including mental health, domestic violence, community, and re-entry courts.<sup>30</sup>

North Carolina Drug Treatment Courts (DTC) were established by statute in 1995 to enhance and monitor the delivery of treatment services to chemically dependent adult offenders while holding those offenders rigorously accountable for complying with their court-ordered treatment plans. In 2001, the North Carolina General Assembly formally authorized expansion of the

DTCs to include substance abusing juvenile offenders and chemically dependent parents of neglected or abused children. The overall goal of DTC's is to break the cycle of addiction that gives rise to repeated law-breaking episodes.<sup>31</sup>

## Notable or New Approaches to Diversion Programs

- The San Francisco Pretrial Diversion Project (SFPDP) was established in 1976 through the joint efforts of a group of socially conscious citizens, including the San Francisco Bar Association and the judges of the Municipal Courts. SFPDP was formed to provide nonviolent first-time offenders the opportunity to have their cases dismissed by completing an alternative program of education, rehabilitation, and community service work. One of the most innovative aspects of SFPDP is its Mentor Court. Mentor Court, which began in 1996, is offered by the San Francisco District Attorney's Office to qualified young adults, ages 18 to 25, as a way to divert young drug sellers from a life of crime. Participants are required to attend high-school equivalency or junior college courses, read books and write reports, attend weekly educational support groups, and appear in court twice a month for progress checks. Upon successful completion, a felony conviction is avoided.<sup>32</sup>
- Mediation Program (CNPMP) in Columbus, OH has diverted thousands of criminal cases out of the formal criminal justice system. Instead of the typical "arrest-jail-court" procedure, criminal complaints involving interpersonal disputes such as family arguments, landlord-tenant disagreements, neighborhood fights, and similar conduct of people who must continue to maintain close personal contact with one another, are diverted to a night prosecutor's office within one week of the crime. The victim, the accused, friends, neighbors, and other interested parties

come together in a hearing presided over by the city prosecutor. Hearings are held during the evenings to avoid loss of wages for the participants. The administrative hearings, based on the concept of victim confrontation, serve to reopen the channels of communication between all of the parties. Only about 2% of the complaints referred to the night prosecutor result in filing of formal criminal charges and issuance of arrest warrants. Even more significant, less than 3% of the cases heard by the night prosecutor have follow-up complaints against the original parties, which prove the mediation of interpersonal misdemeanors to be an effective alternative to the formal criminal process.<sup>33</sup>

- The Rhode Island Public Defender Office established the Defender Community Advocacy Program (DCAP), which focuses on court intervention at the arraignment stage. Rhode Island public defenders work with social workers, investigators, intake specialists, the public defender office's community outreach liaison, and administrative staff personnel to provide assessments and identify alternatives to incarceration at the time of arraignment.<sup>34</sup>
- VA looked beyond traditional allies, such as law schools, to institute criminal justice reform. They collaborated with the Engineering Department of the University of Virginia to find new ways to seek assistance with mental health diversion alternatives. The Engineering Department developed an innovative approach to analyzing data and used this methodology to evaluate an existing community drug treatment diversion program. Their report found the program significantly reduced drug use and related criminal behavior. Documenting this program's success led to an expansion in diversion opportunities for the office. 35

The Drug Treatment Alternative to Prison (DTAP) program was established by Kings County, Brooklyn, NY. In 1990, the New York District Attorney, Charles J. Hynes, set up a program to divert into treatment non-violent felony offenders with one or more prior felony convictions and documented histories of drug abuse. Defendants accepted into DTAP have their sentences deferred while undergoing 16 to 24 months of intensive residential drug treatment in one of several residential therapeutic community programs. Those who successfully complete treatment are returned to court to have their charges dismissed. Failure to complete treatment results in prosecution on the original charges, and, in most cases, conviction and state prison sentences. DTAP uses legal coercion to keep participants in treatment. The program has a 66% one-year retention rate i.e., two-thirds of those who were accepted into the program remained in treatment for at least a year.<sup>36</sup>

1 Joan Nuffield, *Diversion Programs for Adults*, 2006 Public Works and Government Services of Canada 1.

2 *Id*.

3 *Id*.

4 John Clark, The Role of Traditional Pretrial Diversion in the Age of Specialty Treatment Courts: Expanding the Range of Problem Solving Options at the Pretrial Stage, 2007 Pretrial Justice Institute 4.

5 Id. at 16.

6 Marilyn Walczak, *Pretrial Diversion Abstract*, 1998 National Association of Pretrial Services Agencies 2.

7 *Id*.

8 Nuffield, *supra* note 1, at 1.

9 Clark, supra note 4, at 4.

10 Id. 11 Id. 12 Id. 13 Steven Belenko, The Challenges of Integrating Drug Treatment Into the Criminal Justice Process, 63 Alb. L. Rev. 833, 841-45 (2000). 14 Te Leone, Jail Diversion Strategies for Misdemeanor Offenders with Mental Illness, 2001 Louis de la Parte Florida Mental Health Institute University of South Florida 1. 15 Barry Goetz, Pre-Arrest/Booking Drug Control Strategies: Diversion to Treatment, Harm Reduction and Police Involvement, Contemporary Drug Problems Abstract (2006). 35 Id. at 806. 16 Belenko, supra note 13, at 841. 17 Id. 18 Te Leone, *supra* note 14, at 1. 19 Id. 20 Clark, supra note 4, at 4. 21 Id. 22 Id. 23 Id. 24 Id. 25 Id. 26 Walczak, *supra* note 6, at 2. 27 Belenko, supra note 13, at 843.

28 Te Leone, *supra* note 14, at 1.

- 29 Thomas von Hemert, Program Overview (Crisis Intervention Team, Charlottesville, VA), 2007, at 1.
- 30 Clark, supra note 4, at 3.
- 31 http://www.nccourts.org/Citizens/CPrograms/ DTC/Default.asp.
- 32 http://www.sfpretrial.com/home.html.
- 33 http://cad.sagepub.com/cgi/content/abstract/ 21/2/100;http://www.columbuscityattorney.org/prosec ution/prosecution.aspx.
- 34 Cait Clarke & James Neuhard, Therapeutic Jurisprudence and Problem Solving Practices Positively Impact Clients, The Justice Systems, and Communities They Serve, 17 St. Thomas L. Rev. 781, 794 (2005).
- 36 Belenko, supra note 13, at 847.

#### Mediation

#### Scenario 1

Grant S. is a 40-year-old father of two children, ages four and six. He has lived in Briarwood, North Carolina for 10 years. During that time, there has been an ongoing feud between him and his neighbor Tom. Last week the feud turned particularly ugly and Grant assaulted Tom in his front yard. Grant was arrested and charged with assault. The public defender assigned to the case met with Grant, listened to his story, and suggested that he plead guilty to the crime. The defender explained to Grant that he would probably only receive a short probationary period and a minor fine as punishment. Embarrassed and wanting to put the matter behind him, Grant agreed to accept the plea bargain. Two months later, the company that he worked for instituted a new security protocol that required all of their employees to submit to criminal background checks. The assault conviction appeared on Grant's record and he was immediately laid off. Since that time Grant has struggled to pay his bills, and his home is in foreclosure.

#### Scenario 2

During the initial interview, the public defender asks Grant how the incident started. Grant details the years of animosity that have existed between him and Tom and explains that an argument over a parking space escalated into this unfortunate incident. The defender knows of a misdemeanor mediation program and feels that Grant's case is appropriate because the ill will between Grant and Tom was the underlying issue behind the assault. The defender discusses the option with Grant, who agrees to participate. The mediation goes well; Grant and Tom have the opportunity to air their grievances and Grant avoids a criminal conviction.

#### Issue

Mediation is an alternative dispute resolution procedure designed to offer an inexpensive and expedient resolution to a legal dispute. In the civil arena, mediation often replaces traditional litigation by helping parties create agreements tailored to their individual interests.<sup>2</sup> In recent years, mediation has become more commonplace in the criminal justice system. Not all criminal matters, however, are appropriate for mediation.<sup>3</sup> For example, felony cases and serious misdemeanors are usually not suitable for mediation sessions.<sup>4</sup> Conversely, minor misdemeanors such as assault, trespass, and destruction of property are criminal cases frequently referred to mediation programs.<sup>5</sup> Typical participants in mediation programs include family members, business associates, neighbors, and other individuals who have ongoing relationships. Through mediation these parties often experience more satisfaction and achieve resolutions that are not available via the traditional criminal justice system.<sup>7</sup>

Cases referred to mediation programs originate from several different sources. Prosecutors, defense attorneys, and judges may refer cases to mediation.8 When a criminal matter is referred to mediation, the case manager performs the initial screening function. However, the mediator is ultimately responsible for determining if the case is appropriate for the program.<sup>9</sup> The mediator and the parties named in the criminal complaint are the primary participants in a criminal mediation session. 10 The process is voluntary for the victim and the defendant, and either party may elect to bypass mediation and proceed to prosecution. 11 A defense attorney's participation in the mediation process is an attorney-client decision. 12 If a defense attorney does participate in the process, he or she usually assume a passive role.<sup>13</sup>

Criminal mediation always takes place prior to trial.<sup>14</sup> Typically, the mediation program sends each party a letter and brochure about the process.<sup>15</sup> The letter directs the recipients to contact the program to discuss

the option to mediate. <sup>16</sup> When a party contacts the program, the case manager or mediator describes the process, fields questions and, if the parties are agreeable, schedules the mediation session. <sup>17</sup> If there is delay in scheduling a mediation session, prosecutors and defense attorneys usually consent to postponements of trial dates to permit more time for mediation to occur. <sup>18</sup> Should the case fail to be accepted for mediation, the criminal matter will then proceed through the traditional channels of prosecution. <sup>19</sup> Incidents of domestic violence, physical injuries, and the defendant's criminal history are factors that influence the decision about whether to mediate a case. <sup>20</sup>

During the mediation session, the mediator explains the process and presents the parties with a consent form to review and sign expressing their willingness to participate in the program. The parties are then given an opportunity to share their perspectives, voice any concerns, and identify their interests with regard to how the matter should be resolved. The ideas that are generated during the session are evaluated to determine if they are acceptable and realistic solutions. Once the parties have developed and finalized their resolutions, the mediator reduces the agreement to writing, which both parties sign. Afterwards, the parties receive a copy of the agreement and the mediator retains the original.

Following the mediation session, but prior to the scheduled trial date, the mediator meets with the prosecutor assigned to the case to share the content of the parties' written agreement and to provide a recommendation for case disposition. <sup>26</sup> Cases resolved through mediation may be subject to one of two possible legal dispositions. <sup>27</sup> A case may receive a *nolle prosequi*, or dismissal, or be placed on an inactive docket. <sup>28</sup> The final decision with regard to case disposition rests with the prosecutor. <sup>29</sup>

Stakeholders in a criminal matter may reap many benefits from exposure to mediation.<sup>30</sup> For example, the parties receive a confidential forum to air their

grievances and discuss the matter thoroughly.<sup>31</sup> Moreover, mediation gives the parties a unique opportunity to design their own resolutions.<sup>32</sup> Mediation is also advantageous to prosecutors and the judicial system.<sup>33</sup> Insufficient evidence, unpredictable witnesses, and many other factors often render a case difficult to prove at trial, thus making mediation a more attractive dispositional option.<sup>34</sup> Furthermore, research has shown that individuals who participate in criminal mediation are less likely to re-encounter the criminal justice system.<sup>35</sup>

## Notable Approaches, Innovations and Strategies

Criminal justice stakeholders across the country are using criminal mediation and other alternative dispute resolution procedures as a substitute for traditional prosecution. Some of the most notable innovations and programs include:

- State's Attorney Mediation Program: The criminal mediation program in Anne Arundel County, MD is an internal program of the State's Attorney's Office (SAO), consisting of one mediator and one case manager. Since 1983, the program has been helping the SAO resolve criminal cases prior to trial. The program continues to thrive, with an average of 250-400 cases being resolved through mediation each year.<sup>36</sup>
- Judicial Mediation Program: The Maryland Judiciary's Mediation and Conflict Resolution Office (MACRO) offers grants to Maryland State's Attorneys' Offices to start or expand criminal mediation programs. MACRO was created by and is chaired by the Honorable Robert M. Bell, Chief Judge of Maryland's highest appellate court. According to Chief Judge Bell, "Criminal mediation can often get to the root causes of ongoing conflicts that otherwise reappear before the courts over and over again. In mediation, the participants may find permanent

- solutions by agreeing to certain forms of relief that the courts are prescribed from providing."<sup>37</sup>
- Programs: In September 2008, the American Bar Association solicited proposals for the Mediation in Criminal Matters Project. The Project invited state and local bar associations, courts, public defender offices, prosecutor offices, and other similar organizations to apply for one of ten minigrants to support the implementation of mediation in criminal matters. The Project was interested in funding different types of criminal justice mediation program models and recipients had to agree to expand or implement programs and conduct training for other judges, defense lawyers, and academics from their local communities. 38
- Settlement Conferences in Criminal Court:

  Settlement conferences are utilized by the

  Superior Court of Arizona in Maricopa County, a
  general jurisdiction court in which 28 judges and
  29 commissioners are assigned a criminal
  calendar. In 1996, judges began conducting
  settlement conferences in criminal cases with the
  consent of both parties. Subsequently, these
  judges petitioned the Arizona Supreme Court for
  a rule formally authorizing such conferences,
  which resulted in a permanent procedure
  governing the use of settlement conferences in
  criminal matters.<sup>39</sup>
- Non-profit Mediation Agencies: The Dispute
  Settlement Center (DSC) in Wilton, CT is a nonprofit mediation agency offering skilled conflict
  resolution services. DSC aims to reduce crime,
  violence, and the burden on the courts in Western
  Connecticut. DSC provides mediation services to
  three adult criminal courts in cases that can be
  better handled outside of the courtroom and
  between the parties themselves. In a typical year,
  DSC mediates over 1,800 cases for the courts,
  helping to reduce the backlog in the court system

- by settling over 90% of the court cases where the parties agree to mediate. DSC works with prosecutors, judges, defense attorneys, and mediation participants to make the program accessible, reliable, and effective. There are no fees to participants in court-based mediation because costs are covered by state and local grants. 40
- Misdemeanor Mediation Project: The Center for Conflict Resolution (CCR) provides free mediation services in over 2,000 cases, trains hundreds of mediators, facilitates meetings, and works with dozens of businesses, government agencies, and organizations to create custom-designed dispute resolution systems and training programs. CCR assists courts in Illinois in mediating a variety of criminal matters, including (depending on the court) adult criminal misdemeanor cases, assault/battery/harassment between parties who have ongoing relationships, and simple assaults between juveniles and victims.<sup>41</sup>
- Partnership Between the Court and Non-profit Organization: The New York State Unified Court System partners with local non-profit organizations that provide mediation, arbitration, group facilitation, and other dispute resolution options as alternatives to court proceedings. These services are available in all 62 New York counties and include mediation of civil, criminal, and family disputes. The program was created over 25 years ago in part to help address backlogs in certain criminal matters. Many cases sent to mediation in New York City are actually diverted from criminal court, including harassment complaints and violations, and some centers handle low-level misdemeanors such as assault. The authorizing legislation allows for mediation of certain types of felonies, though very few are actually mediated. The Office of Alternative Dispute Resolution is also involved in victim-

offender dialogue and other restorative justice initiatives. 42

- District Court Mediation Program: In North Carolina, the District Criminal Court Mediation Program provides an opportunity for those involved in a court case to sit down with a mediator to try to talk through their dispute. The mediator does not decide the case but helps the parties come to their own agreement. If an agreement is reached, the case may be dismissed, but the case remains before the court if no agreement is achieved. Participation is voluntary and may be requested by the parties or suggested by the judge or district attorney. The mediation is confidential. The Program was created by state statute, and is implemented at the district court level, sometimes with the assistance of community mediation programs.<sup>43</sup>
- Community Mediation Program: The Charlotte-Mecklenburg Community Relations Community-Dispute Settlement Program in Charlotte, NC handles both juvenile and adult misdemeanor criminal cases. The program receives case referrals from courts, magistrates, police officers, private citizens, and government agencies from within the city.<sup>44</sup>
- Justice Project (JJP) is a collaborative effort of the NC Governor's Crime Commission, The Norman Adrian Wiggins School of Law, and the Eleventh Judicial District (comprised of Harnett, Johnston, and Lee Counties). Juvenile criminal cases from District 11 are referred by the District Attorney's Office or the juvenile's defense attorney when it is determined that a case can be mediated without prosecution. Second and third year law students involved in the program have the opportunity to serve as co-mediators with trained law school faculty. In the next two years the project will expand into the three county school systems. This is significant because the

schools will have the opportunity to defer cases to mediation, which would normally be sent directly to the courts. The most typical crimes mediated through the program are assault and property crimes. 45

1 Brandon J. Lester, System Failure: The Case for Supplanting Negotiation with Mediation in Plea Bargaining, 20 Ohio St. J. on Disp. Resol. 563, 579 (2005).

2 Richard M. Calkins, *Mediation: The Gentler Way*, 41 San Diego L. Rev. 277, 280 (1996).

3 Jean Whyte, *How Do You Mediate a Criminal Case?*, 15 A.B.A. Crim. Just. Section Newsl. 12 (2006).

4 *Id*.

5 *Id*.

6 *Id*.

7 Doug Marfice, *The Mischief of Court-Ordered Mediation*, 39 Idaho L. Rev. 57, 59 (2002) (finding that mediation aids "negotiating parties in reaching mutually acceptable terms of settlement").

8 Whyte, *supra* note 3, at 12.

9 *Id*.

10 *Id*.

11 *Id*.

12 Id.

13 *Id*.

14 *Id*.

15 Id.

16 Id.

17 <i>Id</i> .	40 http://www.ctresolution.org/Adult_Court_ Mediation.html.
18 <i>Id</i> . 19 <i>Id</i> .	41 http://www.ccrchicago.org/mission.html.
20 <i>Id</i> . at 13.	42 Mediation in Criminal Matters: Survey of ADR and Restorative Justice Programs, 2008 Am. Bar Ass'n
21 <i>Id</i> .	36.
22 <i>Id</i> . 23 <i>Id</i> .	43 http://www.nccourts.org/Courts/CRS/Councils/DRC/District/Default.asp.
24 <i>Id</i> .	44 Mediation in Criminal Matters, <i>supra</i> note 42, at 44.
25 <i>Id</i> .	45 http://law.campbell.edu/pubs/jjp.html.
26 <i>Id</i> .	
27 Id.	
28 <i>Id</i> .	
29 <i>Id</i> .	
30 <i>Id</i> .	
31 <i>Id</i> .	
32 <i>Id</i> .	
33 <i>Id</i> .	
34 <i>Id</i> .	
35 <i>Id</i> .	
36 <i>Id</i> .	
37 <i>Id</i> .	
38 Request For Proposals For The 2008 Mediation In Criminal Matters Project, 2008 Am. Bar Ass'n Sept. 2.	

*Id*. at 4.

### Adjudication Partnerships

#### Scenario 1

On Saturday night, George C. is arrested for driving under the influence. When he arrives at the station, Deputy Sheriff Lee lets out a sigh of exasperation and goes to the storage closet to retrieve another bedroll. Once again, the county jail has more detainees than beds. Much to Deputy Lee's dismay, she processes many of these same men month after month for the same offenses. She often wishes there was something she could do to help them, but she ultimately decides that is not her role in the system. Meanwhile, George finds some space on the floor next to three other men who were processed earlier in the evening.

#### Scenario 2

Due to overcrowding in the county jail, the public defender assigned to George's case waits six hours to interview him. Frustrated with the process, the public defender approaches the chief judge and district attorney about working collaboratively to address the overcrowding situation. Together, they work to establish a task force consisting of representatives from the community, courts, prosecutor's office, public defender's office, corrections, and law enforcement. The task force meets once a month and develops a strategic plan to address jail overcrowding.

#### Issue

Criminal justice professionals face a myriad of complex problems that impact various agencies in the criminal justice system. A single agency cannot solve many of these problems alone. Moreover, leaders in the justice system have come to the realization that whenever one part of the system acts in isolation, the effectiveness of the entire system can be adversely affected. Therefore, organizations that once functioned autonomously are starting to collaborate, as justice professionals seek to develop solutions to backlogged dockets, crowded jails, and recidivism of

offenders.<sup>3</sup> These collaborative efforts, also referred to as adjudication partnerships, bring together representatives from different justice system agencies to identify common problems and then develop strategies and implement solutions to solve them.<sup>4</sup>

Ideally, these partnerships would include representatives from the prosecution, defense, and the courts. The participation of law enforcement, corrections, and community leaders also may be important. Many collaborative efforts, which begin as short-term partnerships, are so successful that, once participants realize the benefits of working together, they evolve into long-term partnerships that resolve other shared problems.

The term adjudication partnership serves as an umbrella concept under which many interagency efforts can be classified.

— Jane N. Sigmon et al, *Key Elements of Successful Adjudication Partnerships*, 1999
Bureau of Justice Assistance Bulletin

The majority of indigent defense attorneys are trained to work in an adversarial system, training which does not naturally lend itself toward the idea of collaboration with actors normally considered adversaries. Adjudication partnerships require collaboration among a myriad of criminal justice and community stakeholders. Therefore, some indigent defense attorneys may need to develop additional skills to function productively in partnerships that have the potential to produce better results for indigent clients than the traditional adversarial system.

Adjudication partnerships facilitate input from a diverse group of community stakeholders, such as local government leaders, human service providers, scholars, and members of the public. Such diversity ensures that a panoply of perspectives contribute to

the policymaking process, which makes accomplishing partnership goals more likely and increases the likelihood of community buy-in from the beginning of the project. Community members see adjudication partnerships as promising alternatives to the traditional operation of the criminal justice system. These innovative collaborations provide community members an opportunity to participate in the development of criminal justice policy and programming. Prior to the advent of such partnerships, criminal justice policy was often developed without community input. Consequently, many initiatives failed because they lacked vital community support.

Researchers from the American Prosecutors Research Institute (APRI), the National Center for State Courts (NCSC), and the National Legal Aid and Defender Association (NLADA) collaborated on a study funded by the Bureau of Justice Assistance (BJA) to document existing adjudication partnerships. The research team determined that successful partnerships shared the following characteristics:<sup>8</sup>

- Leadership: Strong leadership is vital for a successful partnership between parties that were once adversaries. One or more key individuals from each justice system agency must initiate dialogue with other leaders. Such an effort requires a leader to possess a unique skill set, including the abilities to identify problems, cast a vision of how the partnership will overcome obstacles, and motivate team members to become equally invested in the partnership. Public defenders, district attorneys, judges, and local government officials are equally qualified to lead successful partnerships.
- Diverse Membership: Leadership should approach a variety of stakeholders to take part in the partnership, including representatives of the bench, the bar, law enforcement and correction communities, local government leaders, human service providers, scholars, and members of the public, to ensure a wide spectrum of perspectives

- and experiences. Such diversity makes accomplishing partnership goals more likely and minimizes the risk of non-member interference once a project is underway.<sup>10</sup>
- Goals: Goals must be established and those goals must be clear, meaningful, and attainable. Team members will commit to the partnership if objectives are clear, benefit their specific interests, and are achievable within a certain amount of time. Leadership should establish short- and long-term goals, order priorities, and create reasonable timelines for resolving problems in order to secure consensus among team members.<sup>11</sup>
- Team Approach: Members of successful adjudication partnerships work with the understanding that each participating agency has legitimate needs and concerns. Leadership should establish clearly defined roles and responsibilities for each partner in order to foster overall accountability. 12
- Long-Term View: In order for an adjudication partnership to be successful, team members must sustain a long-term outlook. The complex problems facing communities and criminal justice systems require complex solutions that take time, patience, and persistence to implement. Team members should use a long-term view to develop reasonable time lines for putting plans in action.<sup>13</sup>
- Research and Evaluation: Successful adjudication partnerships learn from the successes and failures of other partnerships. During the strategic planning stage of the partnership, team members should consider the best practices established by other jurisdictions. In addition, members will find research and evaluation data useful when seeking additional support for the project.<sup>14</sup>
- Broad Support: A broad base of support is critical to the success of an adjudication

partnership. Early input from the community provides an additional perspective on the problems facing the criminal justice system. Also, community input may lead to new ideas for potential remedies and add the necessary energy to sustain long-term objectives. Members of the adjudication partnership should communicate to the public the partnership's mission and goals and extend an invitation for others to join their efforts.<sup>15</sup>

# Notable Approaches, Innovations, and Strategies

Across the country, public defenders, prosecutors, and other criminal justice system actors are collaborating to create more effective and efficient criminal justice systems and to provide better outcomes for criminal defendants.

- Improved Court Efficiency for Public Defenders, Prosecutors, and Judges
- The Los Angeles Countywide Criminal Justice
  Coordination Committee (CCJCC) was formed in
  1981 and currently has 40 members. The
  committee includes a wide range of officials,
  including city, county, state, and federal law
  enforcement agency personnel, superior and
  municipal court judges, the district attorney, city
  prosecutors, the chief public defender, the head
  probation officer, and other local leaders
  representing education, health, and human
  services. Examples of CCJCC's past projects
  include: 16
  - Creating programs and strategies to reduce trial delays and relieve jail overcrowding;
  - Establishing community-based alternatives to incarceration;
  - Establishing a county drug court program that provides court-enforced drug treatment for nonviolent offenders;

- Drafting legislative proposals in such areas as video arraignment, revenue collection, drug court diversion, and child abuse; and
- Developing a CD-ROM that provides information to the courts, prosecutors, law enforcement agencies, probation, and public defender offices.
- An increase in felony caseloads in Los Angeles County, CA prompted two judges to start the Early Felony Disposition Program. This informal partnership was developed to expedite the disposition of less serious, nonviolent, first-time felony offenders in municipal court. The judges met regularly with the district attorney, public defender, sheriff, and representatives from pretrial services to develop the program. The expedited adjudication procedures enable cases to be resolved within three days of arraignment. Moreover, the program has consistently removed between 300 and 500 felony cases per month from the superior court calendar. Because of its success, similar early disposition programs have been established in several other municipal courts in Los Angeles County.<sup>17</sup>

#### Developing Alternative Sanctions

In Cedar Rapids, Iowa, the Director of the Department of Correctional Services partnered with a district court judge and a legislator to form the Intermediate Sanctions Policy Group (ISPG). The purpose of the group was to collaborate on the expansion of alternative sanctions as sentencing options. Representatives from the courts, prosecutor's office, public defender's office, law enforcement agencies, and juvenile probation met to set common goals and develop an implementation plan for the group. The group's accomplishments include reducing the delay for probation revocation cases from three months to 10-14 days and designating one afternoon each week to hear driving under suspension cases, which accounted for nearly

20% of the court docket. The ISPG continues to meet regularly to collaborate on emerging issues. <sup>18</sup>

# Contain Costs without Sacrificing Quality Legal Representation:

As part of a pilot program funded by the State
Justice Institute, Washington State set up a task
force to develop a proposal for containing costs
while maintaining quality legal representation for
indigent defendants. In less than a year, the group,
led by the lieutenant governor, proposed 11
recommendations, which included indigent
defense improvements such as not requiring bond
for dozens of minor misdemeanors, allowing local
prosecutors to treat certain misdemeanors as civil
infractions, and reviewing all low-class felonies
for possible reclassification as gross
misdemeanors or misdemeanors.<sup>19</sup>

# Initiatives to Expand Indigent Defense Funding

A report done on the Florida criminal justice system revealed an imbalance of funding among law enforcement, the adjudicatory component (including the prosecution, indigent defense, and the courts), and corrections. The report detailed two major findings: (1) the front and back ends of the criminal justice system are traditionally better funded than the middle; and (2) the continued failure of the Florida legislature to adequately fund the adjudicatory component compromises the state's efforts to control crime. As a result, the state court system, the Florida State Attorneys Association, the Florida Public Defenders Association, and the Florida Office of the Attorney General formed a coalition called "Fill the Gap" to lobby together for increased funding for the adjudicatory component. Their efforts were successful and resulted in increased funding for the courts, prosecution, and public defense.<sup>20</sup>

The Delaware Criminal Justice Council (CJC) is an independent agency created within the executive branch of the Delaware state government. One function of the council is to allocate federal resources, including funds from the Victims of Crime Act and Violence Against Women Act. The agency is comprised of representatives from the police, the courts, the prosecution, the public defender, parole, medical examiner, schools, and the public. The public defender plays a prominent role within the agency and actively participates in the distribution of federal funds throughout the criminal justice system. One program receiving such funding, where the public defender was particularly active, was the state's video conferencing system. The video conferencing system is utilized statewide by prosecutor and public defender offices, and links them with local police departments and courtrooms. The project accelerates warrant processing, bail hearings, arraignments, and evidentiary hearings and reduces police commuting costs and times.<sup>21</sup>

# Salary Parity for Public Defenders

Public defenders and district attorneys in both Orange County, CA and Minneapolis/St. Paul, MN joined forces and established unions to advocate for salary parity for similar positions in both attorney offices. In Orange County, CA, the district attorneys threatened to strike when the County Board of Supervisors recommended salary cuts for public defender positions. The Orange County Public Defender reported that, without the support of the district attorneys, the recommended salary cuts would have surely been adopted.<sup>22</sup>

<sup>1</sup> Jane N. Sigmon et al., *Key Elements of Successful Adjudication Partnerships*, 1999 Bureau of Justice Assistance Bulletin 1.

2 <i>Id</i> .
3 <i>Id</i> .
4 <i>Id</i> .
5 <i>Id</i> .
6 <i>Id.</i> at 1-2.
7 <i>Id</i> .
8 <i>Id.</i> at 2-3.
9 <i>Id</i> .
10 <i>Id</i> .
11 <i>Id.</i> at 3.
12 <i>Id</i> .
13 <i>Id.</i> at 4.
14 <i>Id</i> .
15 <i>Id</i> .
16 Robert L. Spangenberg & Marea L. Beeman, Improving State and Local Criminal Justice Systems: A Report on How Public Defenders, Prosecutors, and Other Criminal Justice System Practitioners Are Collaborating Across the Country, 1999 the Spangenberg Group for the Amer. Bar Ass'n 1.
17 Sigmon et al., <i>supra</i> note 1, at 5.
18 <i>Id</i> .
19 Spangenberg, <i>supra</i> note 16, at 5.
20 <i>Id.</i> at 6.
21 <i>Id</i> . at 4.
22 <i>Id</i> . at 7.

# Part II.4: Making Indigent Defense Work for the Community

Exploding criminal justice caseloads and costs and tight government budgets have increased the pressures on indigent defense services to the breaking point in many communities around the country. This section highlights some the strategies developed by indigent defense agencies to rally support for indigent defense in their communities and to ensure continued funding, as well as strategies to mitigate on a system level some of the negative impacts tough on crime policies have had on communities.

- A. Community Defense
- B. Legal Education and Crime Prevention
- C. Proactive Policy Advocacy

## Community Defense

#### Scenario 1

Ryan S. is 18 years old and a senior in high school. He has been accepted to college and was recently awarded an academic scholarship. Two weeks ago, Ryan was caught with a gun in school, which resulted in his being expelled. Ryan now faces criminal charges in connection with the gun incident and will probably lose his academic scholarship to college. His court-appointed attorney asks Ryan why he had the gun at school, and Ryan responds that he was recently threatened by some gang members from his neighborhood. The gun was not loaded and he only planned to pull it out and posture with it if the gang members threatened him on his way home from school. Now Ryan will likely have a criminal record, which places his entire future in jeopardy.

#### Scenario 2

Two years ago, when Ryan was a sophomore in high school, the local public defender's office started a proactive community outreach program. The office's outreach program includes a mentorship program that pairs defenders with youth from the community. In addition, the office teaches Street Law classes at Ryan's school and conducts a gun buyback program for members of the community. In one of the Street Law classes, Ryan went through some role playing exercises that promoted non-violent conflict resolution. Ryan was also a participant in the mentorship program. Ryan contacted the public defender who was his mentor when he started getting harassed by the guys in the neighborhood. The defender arranged a meeting between Ryan, the guys from the neighborhood, and a former gang member, who now serves as an anti-gang activist, to quash the issue before it escalated to a dangerous level. The meeting was productive. Ryan and the guys from the neighborhood worked out their perceived differences and Ryan is now on his way to college in just a few weeks.

#### Issue

In the late 1980's, criminal justice policymakers and practitioners began to experiment with a new criminal justice approach called community justice. Collectively, the community justice movement consists of:<sup>2</sup>

- Community policing;
- Community watch;
- Community prosecution;
- Community defense;
- Community probation;
- Community corrections; and
- Community courts.

The community justice approach shifts the focus away from traditional case processing toward proactive problem solving in partnership with affected communities.<sup>3</sup> The principal goals of the movement are to improve the integrity of the process, to protect the innocent, and to help individuals solve the underlying problems that entangle people in the criminal justice system in the first place.<sup>4</sup> To accomplish these objectives, the community justice movement seeks to increase collaboration between community members and criminal justice stakeholders to bolster the work of police, prosecutors, defense lawyers, and the courts.<sup>5</sup>

Over the last three decades, public defense agencies have attempted to invent a more innovative, client-centered defense culture.<sup>6</sup> As a result, indigent defenders now view the attorney-client relationship as an opportunity to address the extra-legal needs of their clients and the communities they come from.<sup>7</sup> This expanded view of legal representation has led many indigent defense agencies to practice what some scholars refer to as community defense.<sup>8</sup> Community defense is rooted in the belief that indigent defense agencies can improve client representation and outcomes through a deep commitment to the communities in which their clients live.<sup>9</sup> Community

defenders provide traditional legal representation but also seek collaborations with neighboring community members, community groups, and social service providers so clients can access services directed at solving problems rarely addressed through traditional case representation.<sup>10</sup>

Defenders have found that the relationships they establish with communities help improve case dispositions for their clients. 11 For example, community engagement provides defenders with more access to community resources and information, which can be used by attorneys to locate diversion alternatives for their clients. 12 Also, defenders who are known by the people in their area report they are better able to investigate and develop the facts in their cases, which helps them at trial and during plea discussions. 13 Moreover, indigent defense agencies build rapports of trust with client communities when they voice community concerns to other criminal justice stakeholders. 14 Greater trust between client communities and indigent defense agencies helps combat the misconception held by many indigent defense clients that indigent defenders are merely an arm of the prosecution.<sup>15</sup> Furthermore, increased communication between client communities and indigent defenders may provide early warning signs about deeper systemic problems, such as racial profiling and police brutality, which may not be readily apparent to prosecutors, police, or criminal justice policymakers.<sup>16</sup>

# Notable Approaches, Innovations and Strategies

Inadequate indigent defense funding has resulted in volunteers initiating most of the community defender activity. However, more and more defender managers are stretching their budgets and hiring non-traditional staff to engage in community outreach. Some of the most innovative community defender programs include:

# Community Volunteers in Public Defender Offices

Portland, OR has consistently relied on the services of people in the community to support Portland public defenders in trial preparation, plea negotiations, and sentencing hearings. In addition, Portland public defenders hire legal assistants and outreach coordinators from the community to help expand the scope of services offered to clients. 19

## Crime and Violence Prevention

- Indigent defense service providers are thinking strategically about ways to improve public safety by reducing recidivism and community victimization. For example, the Miami-Dade Public Defender Office in Florida started an antiviolence initiative with defender and community collaborations. The program is designed to help clients lead law-abiding lives by developing diversion programs and sentencing options and expanding access to effective treatment. The antiviolence initiative is based on a public health model that incorporates social science and treatment programs into client representation.<sup>20</sup>
- The Defender Association in Seattle organized a coalition of community advocates to support development of "Clean Dreams," a street level outreach program in the Rainer Beach neighborhood to prevent arrests by offering people who sell drugs immediate access to resources they can use to leave the streets and change their lives. Established in 2006, Clean Dreams offers case management and services such as housing assistance, substance abuse treatment, education, job training and placement, and clothing to help people transition to stable, law-abiding lives.<sup>21</sup>

- The San Diego Public Defender Office works closely with St. Vincent de Paul Village, a faith-based organization, to implement alternative sentencing programs that include anger management classes and mental health services. Public defenders work with forensic social workers, who conduct basic mental status exams. This collaboration improves the defenders' ability to counsel mentally ill clients more effectively and to find alternative treatment dispositions.<sup>22</sup>
- In Dade County, FL, the Miami Public Defender Office co-sponsored a project called "ArtCARE: Outreach to Juveniles in Adult Jails." The exhibition consisted of a collaborative mural that was created by a local artist whose work touches on social issues like racism, violence, and poverty. 23
- Volunteers from the Bronx Defenders have participated in the Community Arts Exchange. The project works with third graders to bring together visual arts, literature, and music with the goal of increasing self-confidence and insight through creativity and exploration. Volunteers from the office spend Wednesday afternoons reading and painting with the young people in the community.<sup>24</sup>

# Programs to Assist Clients

Many public defender offices help prevent recidivism by participating in programs designed to assist clients with remaining within their communities. They assist former clients with a wide variety of issues from drivers' licenses to literacy.

The Washington State Defenders, in collaboration with other government representatives, developed a plan to address instances where drivers were repeatedly charged with driving without a license (DWOL). The plan diverts DWOL cases to community service plans and allows drivers to

- earn back their drivers' licenses in order to preserve jobs or seek employment opportunities.<sup>25</sup>
- Public defenders in Clark County, Las Vegas, NV developed a program where they travel to a local community center to help residents seal records and resolve bench warrants. The program has helped over 300 individuals who had outstanding bench warrants to get their fines excused or reduced. The Clark County project was spurred by clients' complaints that their criminal records kept them from getting well-paying jobs and their unresolved warrants prevented them from obtaining drivers' licenses.<sup>26</sup>
- Volunteer public defenders in Sonoma County, CA collaborate with the local Human Services Department to help welfare recipients expunge their criminal records or apply for certificates of rehabilitation so the recipients may qualify for jobs.<sup>27</sup>
- In Phoenix, AZ, the Maricopa County Public Defender (MCPD) participates in the Booker T. Washington Headstart Program. The program conducts a Family Literacy Project in which 90% of the families involved in the program live at or below the poverty level. The Family Literacy Project is focused on teaching parents how to make reading with their children an integral part of their families and helping preschool children develop a love for books, as well as the skills needed to read and write well when they enter elementary school. MCPD provides resources and speakers for a monthly Family Literacy Day. The office has distributed free books to the children and their families and has spoken on topics like fire safety, tobacco awareness, and stress management.<sup>28</sup>
- The Juvenile Justice Project of Louisiana (JJPL) has developed the Parents Advocacy Group as part of a strategy to develop stronger community ties. The Parents Advocacy Group strives to train

parents to advocate for their children by engaging in dialogue with judges, legislators, and the media. JJPL has worked closely with community activists and parents of formerly incarcerated youth to organize community awareness events that have attracted media and political attention.<sup>29</sup>

The San Diego Public Defender Office initiated the Literacy Project, which is a community effort that teaches community members to read.

## Community Education

Community defenders engage in a wide variety of community education programs. Defenders are teaching in public schools, community centers, senior citizen centers, jails, and local colleges. They educate their communities about their legal rights and available legal services.

- Sonoma County public defenders conduct in-house training sessions for the medical staff of a local mental health facility. The defenders instruct staff on the rights of the mentally ill and proper legal procedures governing involuntary commitments. Other Sonoma public defenders volunteer to teach classes at local community colleges where they attempt to bridge the gap between legal theory and criminal justice practice. <sup>30</sup>
- The Neighborhood Defender Service of Harlem developed a formal Street Law program for high school students. The program focuses on training students to have positive interactions with law enforcement and to keep conflict with police officers from escalating into arrests or violent confrontations.<sup>31</sup>
- Public defenders in Bridgeport, CT regularly visit housing projects to conduct "Know Your Rights" trainings with residents. One such training at the P.T. Barnum housing project offered information on protective orders, search and seizure, and police brutality.

Project Legal Eagle, a community-based branch office of First Defense Legal Aid (FDLA) in Chicago, seeks to establish strong community ties in order to better serve the particularized needs of the Englewood community. FDLA staff attorneys give presentations at high schools and attend meetings with community, political, and religious leaders. A local organizer works with FDLA on Project Legal Eagle as a community liaison, spreading information about legal services to the youth community and advising FDLA as it cultivates community relationships.<sup>32</sup>

# Policy Initiatives

Many defender agencies work with community leaders to reform criminal justice policy and address disparities in the system, such as race and class.

- Washington State defenders work closely with lawmakers and public policy experts to counter socio-economic disparities and to improve race relations through their Racial Disparity Project. Prior to starting the initiative, organizers of the project sought input from community groups, judges, prosecutors, police, private practitioners, and defender staff and board members.<sup>33</sup>
- The King County Public Defender Office works with activists in the Asian American community to combat racial profiling against young Asian Americans. As an outgrowth of this collaboration, one of the activists working with the defender office eventually joined the city's Racial Profiling Citizen Taskforce, charged with collecting racial profiling data and crafting policy recommendations for the city council.<sup>34</sup>
- The Charlottesville-Albemarle Office of the Public Defender in Virginia created a Citizens Advisory Committee (CAC) composed of community members appointed by the Charlottesville City Council, the Albemarle County government, the Thomas Jefferson Area

Community Criminal Justice Board, local legislative delegates, the local NAACP, and the public defender. In its short history, the CAC has lobbied the legislature for increased resources and defender capacity, spearheaded efforts to recruit lawyers of color, and convened a forum on racial profiling. The CAC has also advocated for courtappointed attorneys to be paid higher fees and for the restoration of civil rights to formerly incarcerated people.<sup>35</sup>

The chief public defender of the Rhode Island Public Defender Office developed a list of agencies and organizations serving Rhode Island communities of color. Afterwards, he wrote each organization a letter describing the racial injustice he saw in the criminal justice system and explained the public defender's role in combating these problems. In addition, he extended an invitation to community leaders to discuss their concerns with him and his staff. The partnerships that emerged out of these discussions encouraged the public defender to establish an in-house "Community Partnership Council," consisting of attorneys, social workers, intake personnel, and support staff. The Council meets monthly to plan community outreach and education events, build public relations, and discuss developments in the provision of client-centered services. In 2004, the office was awarded a grant to hire a full-time community liaison.36

4 Clarke, *supra* note 2, at 20.

5 *Id*.

6 See generally Robin Steinberg & David Feige, Cultural Revolution: Transforming the Public Defender's Office, 29 N.Y.U. Rev. L. & Soc. Change 123 (2004).

7 Cait Clarke, *Problem Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 Geo. J. Legal Ethics 401, 404 (Winter 2001).

8 Clarke, supra note 2, at 23.

9 http://www.brennancenter.org/content/section/category/community\_oriented\_defender\_network/.

10 Christopher Muller, *The Case For Community Defense in New Orleans*, 2006 Brennan Center for Justice at NYU School of Law 1.

11 http://www.brennancenter.org/content/section/category/community\_oriented\_defender\_network/.

12 Clarke, supra note 2, at 23.

13 Kim Levingston, *Taking Public Defense to the Streets*, 2003 Brennan Center for Justice NYU School of Law 2.

14 Clarke, supra note 2, at 22.

15 Muller, *supra* note 10, at 22, 29.

16 Clarke, supra note 2, at 23.

17 *Id*.

18 *Id*.

19 Id. at 24.

<sup>1</sup> Roger Conner, *Community Oriented Lawyering: An Emerging Legal Approach to Legal Practice*, 2000 Nat'l Inst. of Just. J. 27.

<sup>2</sup> Cait Clarke, Community Defenders in the 21st Century: Building on a Tradition of Problem-Solving for Clients, Families and Needy Communities, United States Attorney Bulletin, 2001, at 20.

<sup>3</sup> Conner, supra note 1, at 27.

- 20 Bennett H. Brummer, *Community Partnerships*, *Holistic Advocacy Through a Public Defender Anti-Violence Initiative* (National Legal Aid and Defender Association, New York, NY) 3 Indigent Defense May/June 1999, at 1.
- 21 Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers, 2008 Sentencing Project 42.
- 22 Clarke, supra note 2, at 25.
- 23 Levingston, supra note 13, at 10.
- 24 http://www.bronxdefenders.org/?page=content &param=the\_community\_arts\_exchange.
- 25 Clarke, supra note 2, at 25.
- 26 Muller, supra note 10, at 22.
- 27 Clarke, supra note 2, at 26.
- 28 Levingston, supra note 13, at 4.
- 29 Id. at 9.
- 30 Clarke, supra note 2, at 25.
- 31 Christopher Stone, *Community Defense and the Challenge of Community Justice*, 1996 Nat'l Inst. of Just. J. 43.
- 32 Levingston, *supra* note 13, at 2.
- 33 Clarke, supra note 2, at 28.
- 34 Levingston, *supra* note 13, at 6.
- 35 Muller, supra note 10, at 23.
- 36 Id.

#### Legal Education and Crime Prevention

#### Scenario 1

Jason T., Tony S., and Sean W. are seniors at Southeast High School. The three young men have been friends since grammar school and all of them have managed to stay away from gangs and drugs. In addition, all of the boys are on track to graduate even though they live in one of the toughest neighborhoods in the city. Recently, the city experienced a surge in gang violence; as a result, the city council passed a number of ordinances aimed at stemming the tide of crime. One afternoon, Jason, Tony, and Sean were hanging out on the corner in their neighborhood. Unbeknownst to them, a group of youths two blocks away had just robbed a convenience store. Within minutes, police were swarming the neighborhood, and two squad cars pulled up to the corner where the boys were hanging out. The police got out of the squad car with night sticks in hand and ordered the boys to lie face down on the ground. The officers felt their behavior was justified because the boys matched the description given by the store owner of three black youths wearing white T-shirts and blue jeans. Sean reacted to the police behavior by mouthing off, which resulted in his being handcuffed, arrested, and placed in the squad car. In an attempt to come to Sean's defense, Tony lunged at the officer arresting Sean and was taken down by some other officers. He was subsequently charged with assault on a police officer and resisting arrest. Jason followed the officer's orders and lay face down on the ground, but, when the situation escalated to a dangerous level, he was handcuffed, arrested, and taken downtown with the other young men. The boys were eventually ruled out as suspects in the store robbery, but the unfortunate altercation with police resulted in their being charged with criminal offenses that could potentially derail their future goals.

# Scenario 2

Six months before Jason, Tony, and Sean were arrested, the boys participated in a Street Law Clinic

conducted at the local community center by the public defender's office. The Chief Defender started the Street Law Program to educate the youth in the community about their basic legal rights and practical strategies to prevent negative interactions with law enforcement, which often resulted in unnecessary arrests. The program was well received by defenders, prosecutors, law enforcement, and the community. In fact, members from the Sheriff's department volunteered to participate in role-playing exercises with the youth to encourage positive interactions with authority figures. The public defenders educated the community members about the basic elements of antiloitering laws and search and seizure procedures. As a result of their Street Law experience, Jason, Tony, and Sean no longer viewed the police as their enemy. On the day of the convenience store robbery, the boys reacted to the police behavior respectfully and calmly. They answered all of the officers' questions, told them where they went to school, and respectfully asked if they were under arrest or free to leave the scene. The officers responded by briefly frisking the young men and instructing them to go home. In all likelihood, Jason, Tony, and Sean avoided a potentially dangerous interaction with the police as a result of the knowledge and skills they gained from the public defender's Street Law Program.

#### Issue

In recent years, indigent defense agencies have started to expand their traditional role of case representation to include the implementation of legal education and crime prevention strategies. Traditionally, indigent defense agencies were only concerned with protecting a client's due process rights and providing fair and effective legal representation. However, the revolving door nature of the criminal justice system and the corresponding economic and social costs associated with recidivism have spurred indigent defense offices to develop initiatives that would prevent and reduce crime, while still ensuring justice for their clients. Expanding the defense function toward crime prevention not only helps facilitate public safety but

also improves the criminal justice system and the public perception of indigent defense and its role in society.<sup>4</sup>

# Notable Approaches, Innovations and Strategies

Throughout the country, indigent defense agencies are using legal education to prevent crime through a number of innovative strategies. Some of the most notable include:

# Know Your Rights Trainings

- Public defenders in Bridgeport, CT regularly visit housing projects to conduct "Know Your Rights" trainings with residents. One such training at the P.T. Barnum public housing project offered information on protective orders, search and seizure, and police brutality.
- Indigent defenders in the Rhode Island Public Defender Office collaborate with community agencies to develop programs designed to address factors that place people at risk for involvement in the criminal justice system. Defenders coordinate seminars at schools and community agencies to educate the public about the public defender office and their legal rights. In addition, defenders have trained community leaders and developed legal rights brochures on how to help clients avoid entanglements with the criminal justice system.<sup>5</sup>
- A number of indigent defense agencies have realized that crime prevention strategies must begin long before a client comes in contact with the criminal justice system. As a result, some defenders have begun teaching "Street Law" to grassroots audiences using interactive teaching methods. Street Law is a preventive law approach that provides participants with knowledge of what to do when confronted with a legal problem. Typically, most Street Law programs focus on educating citizens on how to have positive

interactions with law enforcement. The community outreach coordinator at the Public Defender Service of Washington, DC schedules Street Law classes in the DC public schools so the attorneys in their office can attempt to derail the notorious schoolhouse-to-jailhouse track.<sup>6</sup>

- Community outreach workers at the Neighborhood Defender Services of Harlem in New York have long conducted trainings about police conduct and community relations.<sup>7</sup>
- Educating Other System Actors to Break the Cycle of Crime and Re-Arrest
- Indigent defense service providers are thinking strategically about ways to improve public safety by reducing recidivism and community victimization. For example, the Miami-Dade Public Defender Office in Florida started an antiviolence initiative with defender and community collaborations. The program is designed to help clients lead law-abiding lives by developing diversion programs and sentencing options and expanding access to effective treatment. The antiviolence initiative is based on a public health model that incorporates social science and treatment programs into client representation. 8
- Indigent defenders are educating professionals from other disciplines who encounter the client community in the regular course of their professional work. For example, the Sonoma County Public Defender Office in Sonoma, CA conducts in-house training sessions for the medical staff of a local mental health facility. Defenders teach the medical staff about the rights of the mentally ill and proper legal procedures governing involuntary commitments.<sup>9</sup>

1 Cait Clarke, *Problem Solving Defenders in the Community: Expanding the Conceptual and Boundaries of Providing Counsel to the Poor*, 14 Geo. J. Legal Ethics 401, 445 (2001).

2 Mark Moore et al., *The Best Defense is No Offense:* Preventing Crime through Effective Public Defense, 2002 John F. Kennedy School of Government Harvard University 1.

3 Laurie Robinson, *Forum on Crime & Justice*, 2002 University of Pennsylvania Jerry Lee Center of Criminology 2.

4 Moore et al., supra note 2, at 1-4.

5 http://www.ripd.org/community.htm.

6 Cait Clarke, Community Defenders in the 21st Century: Building on a Tradition of Problem-Solving for Clients, Families and Needy Communities, United States Attorney Bulletin, 2001, at 25.

7 Christopher Muller, *The Case For Community Defense in New Orleans*, 2006 Brennan Center for Justice at NYU School of Law 23.

8 Bennett H. Brummer, *Community Partnerships: Holistic Advocacy through a Public Defender Anti- Violence Initiative*, 3 Indigent Def. (NLADA
Newsletter, New York, NY) May/June 1999, at 1-5.

9 Clarke, supra note 6, at 25.

## Proactive Policy Advocacy

#### Scenario 1

Rodney L. was arrested by the police for a string of burglaries in town. When Rodney reached the police station, detectives urged him to confess because a victim had identified him from a photo lineup. He was assigned a public defender, who advised him that the prosecution was offering a plea bargain that would result in Rodney serving 60 months in prison. Rodney knew that he was innocent, but thought the plea bargain was a good idea because he did not want to risk getting a harsher sentence if he was found guilty at trial. As a result, Rodney pled guilty to a crime he did not commit.

#### Scenario 2

Six months later, the public defender joined a task force on criminal justice reform. The task force included the District Attorney and members from local law enforcement. The defender used this opportunity to present social science data that showed the increased chances of misidentification when police use photo lineups as opposed to sequential lineups. As a result, the task force changed the police's identification procedures. Six weeks later, Jim N. is arrested for armed robbery of a convenience store. When Jim reaches the police station, he is placed in a sequential lineup with five other men. A witness stands behind a two-way mirror and views the men one at a time. Subsequently, the witness identifies another man in the lineup, and Jim is released.

# Issue

Over the past two decades, numerous developments in state and federal legislation have negatively impacted indigent defense clients and their families. As a result, many indigent defense agencies believe that effective advocacy cannot be limited to the courtroom. They believe indigent defenders need to play a more proactive role in formulating criminal

justice policy.<sup>3</sup> Traditionally, prosecutors have been more active in policymaking than defense lawyers.<sup>4</sup> However, defenders now realize that proactive participation in the policymaking process is an antecedent to effective courtroom advocacy. As Bennett Brummer, the Miami-Dade Public Defender, points out, "Defenders can work hard in a courtroom all day long, but this will be ineffective if prosecutors are the only practitioners on the bar committee that forms the rules of criminal procedure." Moreover, advocacy and public outreach can lead to increased understanding by other criminal justice actors, the community, and funders of the importance of indigent defense to community well-being. This increased understanding can, in turn, lead to increased funding for the indigent defense function.

Defenders can work hard in a courtroom all day long, but this will be ineffective if prosecutors are the only practitioners on the bar committee that forms the rules of criminal procedure.

— Bennett Brummer, Miami-Dade Public Defender (2004)

Defenders can inject the defense perspective into the policymaking arena in a number of ways, including:<sup>6</sup>

- Testifying at legislative hearings;
- Participating in multi-agency task forces, boards, projects, and other partnerships;
- Advocating to change laws;
- Organizing and educating the community to support the defense function; and
- Monitoring policies, laws, and other political activities that may affect their clients.

It is important to note, however, that advocacy can be a double-edged sword. Activities such as publicly lobbying for or against a specific law may alienate one or more legislators, who can respond by cutting indigent defense funding. Indigent defense communities would be wise to carefully assess the pros and cons of each initiative before committing to support it.

# Notable Approaches, Innovations and Strategies

Indigent defense agencies throughout the country have expanded the traditional role of their agencies to include more legislative advocacy. Some of the most notable examples include:

- Hiring Staff to Perform the Advocacy Function
- The Minnesota Board of Public Defense hired a former legislator to be its Government Relations Manager.<sup>7</sup> The position is charged with lobbying for criminal justice reform and monitoring legislation that could negatively impact indigent defense clients during each legislative session.<sup>8</sup>
- Partnering with other Justice System Actors and Community Organizations
  - Some indigent defense agencies partner with other actors in the criminal justice system to submit joint budget requests.<sup>9</sup>
- The Florida Prosecuting Attorneys Association, the Florida Public Defender Association, and the Florida Office of the Attorney General formed a coalition to increase funding for the adjudicatory component of the criminal justice system. The efforts of the coalition proved successful and resulted in increased funding for the courts, prosecution, and public defense. 10
- The Florida Public Defender Office in Miami has increased its political leverage by initiating collaborative efforts with communities. For example, a bill pending in the legislature called

- for taking delinquency cases away from public defender offices. The office mobilized community-based organizations to voice their concerns, which resulted in the bill being amended to delete that particular provision.<sup>11</sup>
- Other defender operations are building networks and important coalitions to monitor policies, laws, and other political activities that may affect their clients. For example, defenders from the Boston Youth Advocacy Project (YAP) have teamed up with the Children's Law Center of Massachusetts to create the "EdLaw Project" in order to work more closely with parents, youth workers, and other lawyers to improve schools and educational advocacy in Boston. YAP was the catalyst for founding the Roxbury Network, which is intended to be a network of youth and community development agencies in Roxbury that promotes issues and monitors legal developments. 12
- Indigent defense agencies have organized clients and their families into supporting constituencies. For example, Judge Crystal Gaines, now an Atlanta traffic court judge, was once the Chief Public Defender in Atlanta, Georgia. Judge Gaines explained how the Atlanta Public Defender Office got clients and their families involved in the legislative process: "As part of our work at the public defender's office, we created a database of our clients and their families. We keep in touch with them after the legal resolution of their cases, building relationships with them and often encouraging them to write letters and send postcards to state legislators. We encourage our clients and their families to voice their concerns about the criminal justice system to legislators because our clients and their families are these legislators' constituents. And, typically, they share our concerns with the criminal justice system and they help us push our political agenda forward."13

- In Minnesota, the Hennepin County Public
  Defender assigns staff attorneys to attend
  community meetings to educate the public on the
  vital role public defense plays in our society.<sup>14</sup>
- Defenders in Washington, DC attached their funding request to the funding levels of law enforcement. When local politicians recommended increasing police department budgets, Kim Taylor-Thompson, the Director of Washington, DC's Public Defender Services, chose to support the measure rather than fight against it. By supporting the effort, DC's Public Defender Services successfully argued that greater police enforcement would require increases to their budget to handle the new cases that would enter the system. <sup>15</sup>

# Being a Player at the Policymaking Table

Defenders have prevented the adoption of criminal procedures that are harmful to indigent clients by sharing the defense perspective at the policymaking table.

David Feige of The Bronx Defenders spearheaded an effort to replace the traditional police lineup procedure with a sequential lineup procedure, by which witnesses view suspects one at a time rather than all together, and thus reduce the likelihood of witness misidentification. <sup>16</sup>

## Legal Advocacy

Some defenders actively lobby for and against laws that may respectively improve or worsen their clients' lives.

Defenders in the San Diego Public Defender Office are part of a coalition that is lobbying for a new law that would provide for GED or equivalency training as part of probation for defense clients. The office assisted in drafting the local policy regarding the new law and is actively lobbying for its implementation.<sup>17</sup>

# **■** Impact Litigation

Over the past fifteen years, public defender and public interest organizations have initiated impact litigation in several jurisdictions. Some defender agencies have sued the state, claiming they are not in a position to render effective legal assistance and comply with their constitutional obligations. Several of those lawsuits had successful resolutions, including one filed by the Connecticut Civil Liberties Union that led to a settlement with a promise by the state to raise assigned counsel rates and to adopt specific performance standards for indigent defense attorneys.<sup>18</sup>

- Miami-Dade Public Defender Office Litigation:
  In September 2008, the Miami-Dade Public
  Defender Office sued the State of Florida for the
  right to refuse to accept more cases. <sup>19</sup> The initial
  ruling in the suit upheld the office's right to
  refuse more cases, but the state has appealed. <sup>20</sup>
  Caseloads in the Miami-Dade office when they
  sued the state had risen to 500 for felony
  attorneys and 2,225 for misdemeanor attorneys.
- ACLU and Columbia Legal Services Class Action Suit: In April 2004, the ACLU and Columbia Legal Services filed a class action suit against Grant County, WA alleging that Grant County public defender caseloads were excessive. The lawsuit was settled in November 2005, and Grant County agreed to comply with the standards endorsed by the Washington State Bar. Also as a result of the lawsuit, in 2005, the Washington Legislature enacted House Bill 1542 that established, for the first time, limited state funding for public defense programs that complied with the standards. Before the bill, all indigent defense was county-funded.<sup>21</sup>

1 Cait Clarke, Problem Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor, 14 Geo. J. of Legal Ethics 401, 438-39 (2001).

2 Kyung M. Lee, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defenders, and the Right to Counsel*, 31 Am. J. Crim. L. 367, 391 (2004).

3 Clarke, supra note 1, at 439.

4 *Id*.

5 Lee, supra note 2, at 391.

6 Clarke, supra note 1, at 439.

7 *Id*.

8 Id.

9 Lee, supra note 2, at 391.

10 Robert L. Spangenberg and Marea L. Beeman, Improving State and Local Criminal Justice Systems: A Report on How Public Defenders, Prosecutors, and Other Criminal Justice System Practitioners Are Collaborating Across the Country, 1999 The Spangenberg Group for the Amer. Bar Ass'n 1.

11 Kim Levingston, *Taking Public Defense to the Streets*, 2003 Brennan Center for Justice NYU School of Law 8.

12 Clarke, *supra* note 1, at 440.

13 Levingston, *supra* note 11, at 2.

14 Telephone Interview with Leonardo Castro, Chief Public Defender, Fourth Judicial District Hennepin County Public Defender Office, in Minneapolis, MN (Aug. 29, 2008).

15 Lee, *supra* note 2, at 391.

16 Clarke, supra note 1, at 439.

17 Id. at 441.

18 Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 Vill. L. Rev. 337, 373 (2006).

19 Erik Eckholm, *Citing Workload: Public Lawyers Reject New Cases*, N.Y. Times, Nov. 8, 2008 at A8.

20 Id.

21 http://aclu-wa.org/inthecourts/detail.cfm?id=370.

# Part II.5: Tools for Better Office Management

Indigent defense agencies are developing ways to improve the quality of legal services provided to clients despite a constant lack of adequate funding. Effective office management is an essential tool in achieving this result. This section highlights some of the tools used by defenders to improve the management of their offices.

- A. Technology
- B. Workload Guidelines
- C. Mission Statements

#### Technology

#### Scenario 1

Susan T. is 35 years old and hearing impaired. She was recently arrested during a police raid for prostitution in a rural part of the state. The public defender assigned to the case has to travel over 70 miles to meet with Susan. More importantly, the public defender has to coordinate his schedule with a sign language interpreter who is willing to travel to the remote area of the state. The combination of these factors has resulted in Susan not seeing her lawyer since she was arrested. It has been three weeks since her arrest and Susan is still in jail. Susan's father came to visit her and told Susan that her employer had let her go, the apartment manager is asking for the rent, and he can no longer afford to keep her pets. Susan told her father that she is completely frustrated with the system and is willing to do whatever she has to do to get out of jail.

#### Scenario 2

After Susan's public defender discovered Susan was hearing impaired and lived in a remote area of the state, he went online and accessed the main indigent defense office's database/scheduling program to find and book an appointment with a sign language interpreter. Next, she arranged to have access to the video conference technology located at the local library. Using these two pieces of technology, the public defender and the interpreter met with Susan via video teleconference. Through this communication, the defender was able to find out that Susan was visiting a relative in the apartment complex when it was raided by the police. In addition, the public defender discovered that Susan was born and raised in a nearby town and works in the area. Susan's attorney used this information to get Susan a bond reduction, which resulted in her getting out of jail and saving her job and apartment. Moreover, the defender is optimistic that Susan will be acquitted of all charges at trial.

#### Issue

During the last 20 years, our society has experienced a technological revolution. The development of the personal computer, cell phone, Internet, and web browser have fundamentally changed the way we work, play, communicate, and learn. According to the Department of Commerce, in 1997, 18.6% of American homes had access to the Internet and 36.6% had a computer. In 2001, a mere four years later, 54% of Americans had Internet access and many more homes had a computer.

Over the course of this period, legal service providers who assist the poor have made remarkable strides in using technology to improve service to clients. Not only has technology helped to make practicing law more efficient on an individual basis, it also has enabled significant system improvements.

# Technology and the Individual Practice of Law

In the mid-1990s, most legal service programs were only beginning to use word processors, the Internet, and computerized case management systems.<sup>4</sup> Very few agencies had their own websites, and only a handful of these sites provided practical information for staff and/or clients.<sup>5</sup> Moreover, hardly any advocates were making full use of outside e-mail or computerized research tools, and few were able to access the Internet from their desktop computers.<sup>6</sup> By 2002, almost every legal service advocate had desktop access to the Internet and e-mail. <sup>7</sup> Today, many legal aid and public defender agencies have implemented case management systems, and, as a result, data collection and analysis have become more reliable and advanced.8 In addition, the majority of indigent legal service providers have developed websites. In fact, by 2002, more than 45 states had statewide websites with useful information for advocates and clients.9

# Technology at the System Level

Technological advances have allowed legal providers to take on tasks that were previously simply not feasible or affordable. For example, several counties in California subscribe to CrimeTime database software, which walks attorneys and prosecutors through the collateral consequences that attach to specific crimes. For the first time, this centralized resource has enabled defense attorneys in these counties to factor information regarding collateral consequences into pretrial release hearings and plea and sentencing negotiations. Moreover, prosecutors use this information to ensure sentencing and prosecution practices are not unduly harsh.

The aforementioned example is just one illustration of the technological advances made by legal service providers in recent years.

Today, almost everywhere you look, you will find organizations using advances in technology to:

- Streamline processes;
- ▶ Enhance communications;
- Increase efficiency;
- Overcome geographical barriers;
- Exchange legal research and expertise;
- Archive, store, and retrieve historical files;
- Take work on the road:
- Communicate with and educate clients and the public;
- Centralize resources;
- Eliminate duplicative work;
- Collect and analyze data;
- Centralize calendaring and scheduling functions;
- Post job listings and recruit volunteer staff;
- Survey stakeholders;
- Provide remote training; and
- Conduct client contact and outreach.

A national survey conducted by the Project for the Future of Equal Justice, a joint effort of the National Legal Aid and Defender Association and the Center for Law and Social Policy, presented a more detailed

comparison of the progress made in these particular areas. The chart on the following page highlights some the key findings from the survey.<sup>10</sup>

No video monitor can exert the same psychological pressures as a physical presence in the courtroom. The judge in robes, the raised bench, witnesses, lawyers, worried family, flags, seals, armed marshals—these elements invest the occasion with the seriousness it warrants, and they surely impel even those bent on deception to reflect on the advisability of their plans. These are far more than empty trappings. Form and process are the pillars that support the structure of our justice system just as ceremony and ritual reinforce the solemnity of religious practice.

— Federal Court Judge Joseph R. Goodwin (2001)

#### Technology: It's Not All Good News

While technology can be an amazing tool that can benefit clients, legal service providers, and other criminal justice system actors, not all technology advances benefit all parties equally. The use of technology can have unintended consequences, which legal service providers need to guard against. Below are some examples of how technology advances can adversely impact indigent defense clients.

videoconferencing and other new computer and telephone technologies to bring lawyers, clients, and other court actors together over geographical distances to reduce costs and unnecessary case delays. Videoconferencing enables attorneys to have meetings with clients from a remote location. Thus, clients who could not get to the office because of distance, disability, child care responsibilities, or other complicating factors can get the same representation as anyone else.<sup>11</sup>

Technology Comparison Chart						
	1997	2001				
Computer Access	Most advocates had computers on their desks, but well under 50% had Pentium processors (nearly a quarter of the advocates were still using 386 processors).	The vast majority of advocates had computers with Pentium processors, and many users had the fastest commonly available processor, the Pentium 3.				
Desktop Internet Access and External E-mail	Well under half of all advocates had either external e-mail or Internet access from their desk.	In most states, all advocates had desktop external e-mail and Internet access, and in no state was the percentage lower than 50%.				
Lexis or Westlaw	Only about a third of advocates used these services. Main reasons for low usage included cost and lack of training.	Most attorneys used these services; only a few states had fewer than half using them.				
E-mail Lists	13% of advocates reported participating in an e-mail list.	The vast majority of advocates participated in e-mail lists.				
Statewide Websites	Three states had active statewide websites with information for advocates and clients.	Forty-seven states and territories had or were building statewide websites with information for advocates and clients.				
Statewide technology coordinators	Only one state had a dedicated staff position for technology efforts, and technology was in the job description for statewide staff in a few other states.	Most states had either a dedicated technology staff position or a technology task force or committee supported by paid staff.				
Internet usage	About half of all advocates had tried using the web for research.	All advocates had used the web, and most were quite comfortable with web-based research.				
Videoconferencing	No state was using videoconferencing either for advocates or clients.	Eight states reported using some form of videoconferencing technologies for advocates to interact with each other; five reported using videoconferencing to interact with clients.				

- Geographical barriers that can cause unnecessary delays in court processes and prevent timely meetings between attorneys and clients in jail or clients who work or are without transportation can be reduced or eliminated. Timelier scheduling of bond and other court hearings can mitigate the disruption and the negative impacts the justice system can have on clients, such as lengthy pretrial incarceration, job loss, losing of housing, etc. However, many advocates warn that the use of videoconferencing must be carefully evaluated. Videoconferencing can limit important communication between defense attorneys and clients. It also can have the effect of depersonalizing the client. The lack of face-to-face interaction between clients and judges and clients
- and attorneys can be dehumanizing and can unconsciously influence court officials and attorneys to be less concerned about the defendants before them.
- term "digital Divide or Access to Technology: The term "digital divide" refers to the gap between those people with effective access to digital and information technology and those without access to it. It includes the imbalances in physical access to technology, as well as the imbalances in the resources and skills needed to effectively participate as a digital citizen. Since socioeconomic status is a major factor of this divide, advocates need to think carefully through access issues and potential unintended consequences. 12

The Need for Literacy: Currently, the majority of the information on the web is text-based. Therefore, successful use of the Internet requires good basic literacy. A significant number of indigent defense clients do not possess that level of literacy. Content developers at indigent defense agencies should create sites that use text, pictures, and video so the sites can be easily navigated and understood.<sup>13</sup>

# Notable Approaches, Innovations, and Strategies

Advances in technology have the potential to improve the delivery of legal services to the poor. Some notable examples of innovative ways indigent defense is using technology include:

- Sharing Legal Information, Expertise, and Work Products
  - Brief banks, on-line manuals, reports, updates, forms, and templates are just some of the resources being posted on Internet websites to assist legal defenders.
- The North Carolina Office of Indigent Defense Services (IDS) posts an appellate brief bank, training manuals, fee application forms, IDS policies and procedures, reports and data, and a host of other helpful tools and information to assist the over 2,500 attorneys handling indigent cases in North Carolina (www.ncids.org).
- The Maryland Legal Assistance Network
  (MLAN) has developed Specialized Document
  Assembly Software. The system, called
  mdjustice.net, uses Rapidocs document assembly
  software that automates the development of
  customized legal pleadings and forms through an
  interactive template. Rapidocs collects all of the
  information required for a legal document
  through a step-by-step question-and-answer
  process and then produces a completed version of
  the form. The free, but password-protected,

system offers more than 100 Maryland-specific legal forms and documents. The available forms cover a diverse range of legal issues typically faced by pro se litigants, including child support, landlord-tenant, divorce, living wills, domestic relations, and debt collection.<sup>14</sup>

Does the prisoner thrust into a cinder block chamber with his face stuck in a camera and told to speak to a man in a glass box feel he has been dealt with equitably? Can the public feel confident he has received a fair hearing? Do families, friends, neighbors, or the press feel they have witnessed the fair administration of justice? All of these participants should have the opportunity to take in the entirety of the courtroom to see and hear and feel what is going on. A court's moral authority rests on the perception that its proceedings are fair and just. Public confidence in the judicial system depends on this perception. The remarkable resiliency of this confidence is something we ought not take for granted, and we should eschew any practice that threatens to demean the dignity of or reduce respect for the courts.

- Federal Court Judge Joseph R. Goodwin (2001)
- Pro Bono Net is an organization that specializes in creating websites to support pro bono and legal aid advocates and their clients. Pro Bono Net supports two different types of web templates. The first template, <a href="www.probono.net">www.probono.net</a>, provides online tools to support both full-time poverty law advocates and pro bono attorneys. Password-protected practice areas organized by legal topics allow users to share information online, including on-line libraries of training materials, model

pleadings and links, a current news page, a training and events calendar, postings of new cases for volunteers, and member-driven e-mail lists. The second template, <a href="www.lawhelp.org">www.lawhelp.org</a>, provides information oriented toward the general public and people searching for assistance with legal problems. The resources on this site include referrals to legal aid and public interest law offices, community legal education, pro se materials, and links to social service support. 15

# Remote Training

Online tutorials, podcasts, and videos can provide both training and technical assistance to members of the defense community.

- The North Carolina Office of Indigent Defense Services (IDS) has developed online training that walks users through how to use the judicial system's email software, TAO.
- NC IDS, in partnership with the North Carolina School of Government (SOG) and the North Carolina Bar Association (NCBA), developed an online CLE on acceptable billing practices for appointed attorneys in North Carolina.
- In May 2009, IDS, SOG, and the NCBA collaborated once again to conduct the first live public defender training that was broadcast over the Internet to trainees across the state. Remote web participants enjoyed an interactive training experience where they could ask questions and provide feedback to instructors and other web trainees.

# Videoconferencing

Videoconferencing can facilitate training and conferencing across significant distances, streamline court procedures, provide access to interpreters, and provide clients easier and faster access to their attorneys, to name a few of the purposes for which it has been used.

- Pine Tree Legal Assistance (PTLA) is a nonprofit organization in Maine that offers free legal services for low-income clients and addresses the long-term barriers to justice affecting low-income persons living in Maine. PTLA built an extensive statewide videoconferencing system for the state's equal justice community. Some of the features of the system include:
  - Videoconferencing between PTLA's six offices around the state for meetings, conferences, and training;
  - Conferences with the judiciary and court administration through a terminal in the State Justice Center:
  - Access to American Sign Language interpreters in Portland from any of the participating locations; and
  - Access for clients from remote, rural locations around the state to PTLA offices and advocates, using the more than 100 already installed videoconferencing units in medical clinics and centers in the most remote areas of the state.

PTLA reports that videoconferencing has been enthusiastically embraced by advocates, staff, and clients. In addition, the partnership with the telemedicine community has enabled both communities to expand their reach. This innovative program is funded by a Technology Opportunity Program grant from the National Technology Infrastructure Administration of the U.S. Department of Commerce, a Technology Initiative Grant from the Legal Services Corporation, and other smaller grants. <sup>16</sup>

#### Surveys

There are a number of Internet websites, such as <a href="https://www.SurveyMonkey.com">www.SurveyMonkey.com</a>, that provide low-cost online survey tools that enable people of all experience levels to create their own surveys quickly and easily, as well as collect survey

responses electronically without additional data entry. Such services usually charge a monthly fee (SurveyMonkey charges \$19.95) that you pay when you want to use the service.

# Electronic Submission of Attorney and Expert Fee Applications

At least five states, Colorado, Massachusetts, North Carolina, Ohio, and South Carolina, have developed or are in the process of developing web-based software that allows attorneys and experts to submit their fee applications electronically. The electronic submission of fee applications can improve data collection, reduce fee processing labor and costs, allow for faster processing of fees, catch and correct fee application errors much more quickly, and improve auditing functions, to name a few advantages.

#### Computer Listservs

Listservs are inexpensive and easy to set up. They allow indigent defense administrators, attorneys, support staff, and others within a state or region to communicate quickly and easily. A query, comment, or news item can instantly circulate to all subscribers on the list for free, and list members can then reply to the entire group. <sup>17</sup> Listservs allow subscribers to solicit feedback on policy proposals, identify legal precedents and solutions, share experiences, distribute reports and surveys, etc.; their uses are endless.

The Legal Services Technology (LS-TECH) email list serves as the focal point for technology
discussions in the legal services community. Over
the course of its lifetime, thousands of messages
and discussion threads have addressed virtually
every technology topic of current interest in the
community. Membership is free and open to
anyone in the equal justice community. Members
use the list to seek advice from other programs on
any topic related to the use of technology in legal

services. To join the LSTECH e-mail list, go to www.lstech.org. 18

- The North Carolina Office of Indigent Defense Services (IDS) operates a number of listservs in their state for:
  - Attorneys by specialty area;
  - Chief Public Defenders and Assistant Public Defenders;
  - Public Defender administrative staff;
  - Private investigators; and
  - Criminal justice researchers and practitioners.

# Job Postings and Volunteer Recruitment

The web is an efficient tool for recruiting both staff and volunteer attorneys. Programs can post job announcements on law and public interest-oriented job sites, where candidates from all over the country can see them. <sup>19</sup>

The North Carolina Office of Indigent Defense Services (IDS) posts job listings for North Carolina's State Defender Offices, including the main IDS office, the Office of the Capital Defender, the Office of the Appellate Defender, and the various public defender offices located across the state.

#### Client Information

New technologies are being used to communicate directly with clients about their legal rights, provide assistance, and help them proceed on their own if they cannot find representation.

The Legal Aid Society of Orange County (LASOC), in conjunction with the Superior Court of Orange County, CA, joined to overcome the procedural hurdles in the legal process by creating the Interactive Community Assistance Network (I-CAN!). I-CAN! is a free kiosk and web-based

legal services system that educates users about the law, provides court tours, and walks them through completing and filing court forms. Kiosks and workstations with I-CAN! are located at courthouses, legal aid offices, and community centers where lower-income people already go to initiate legal proceedings. This technology solution improves access to the judicial system by allowing litigants representing themselves to file more complete pleadings and helps prepare them for their court appearances. I-CAN! currently supports eight different modules with up to 21 forms for various civil matters, including forms for domestic violence, paternity petitions, and waivers for legal filing fees. By using video and touch screen technology, the kiosk version of I-CAN! is more readily accessible to users with literacy problems and those who have little experience with computers. In addition, instructions are available in English, Spanish, and Vietnamese. When the user is done, I-CAN! generates the original forms to be filed with the court, as well as an additional copy for the user. It also generates a missing information page to remind users to fill in blank fields and an instruction page with general information about filing and serving the pleadings. Since judicial forms must be submitted in English, any non-English information input into fields is printed on a separate page to be translated and written into the form. I-CAN! is available for free to courts. legal services programs, and their service partners, and it may be customized for use outside of the Orange County service area. More than 6,000 users have already initiated court actions through I-CAN!20

The North Carolina Office of Indigent Defense Services (IDS) is currently working on an online expungement self-help manual, so clients can obtain information on this remedy prior to consulting attorneys.<sup>21</sup>

# Clearinghouses for Indigent Defense Research and New Trends

- In October 2001, The National Legal Aid and Defender Association (NLADA) launched a website, www.nlada.org, which features separate sections for civil advocates and public defenders, as well as a special section for NLADA members. It includes information on training, jobs, government affairs, delivery systems, state justice communities, and NLADA publications. The NLADA site uses an open-source software platform called Zope. Zope is free to anyone and can be downloaded from the Internet. NLADA is willing to share the "source code" of the new site with anyone in the equal justice community. It is currently sharing the code with the Center for Law and Social Policy and Pine Tree Legal Assistance in Maine, which has helped keep development costs down for both sites and facilitates collaboration among sites.<sup>22</sup>
- Law's (NCPL) website (<a href="www.povertylaw.org">www.povertylaw.org</a>)
  features the Poverty Law Library, with nearly
  6,000 full-text case documents available for
  download, Clearinghouse Review articles from
  1990 to the present, and over 1,000 links to other
  sites of interest, all organized by substantive
  topic. It also includes a weekly poverty law news
  roundup, a collection of substantive news items,
  and the Legal Hotline Technical Assistance
  Project, which includes client and attorney
  versions of frequently asked questions and selfhelp guides for every state. 23

## Ancillary Areas of Interest to Clients

The National Council on the Aging (NCOA) has developed an innovative website, <a href="www.ncoa.org">www.ncoa.org</a>, which they call BenefitsCheckUP. Millions of older Americans are not receiving the benefits that they are eligible for, such as Food Stamps, pharmacy assistance, and in-home services. NCOA is addressing this problem through

BenefitsCheckUP. This confidential, online service contains a straightforward questionnaire that runs a comprehensive search through 1,000 different assistance programs in all 50 states and the District of Columbia. In less than 15 minutes, the answers from the questionnaire are used to figure out what benefits the person qualifies for and how the person can claim the benefits. Through BenefitsCheckUp, NCOA hopes to serve five to 10 million seniors over the next four years, linking them with essential services they are currently not accessing. Since its launch in June 2001, nearly 500,000 people have already used the site. One caregiver commented that because of BenefitsCheckUp, he discovered that his mother was eligible for elderly pharmaceutical insurance coverage. His mother is now "paying about \$40 per month for medications that had previously cost her over \$200." After finishing the questionnaire, the site generates an individualized report at the end of the session with details about the programs for which the user may be eligible, including relevant program contact information and directions on how to sign up for the programs. In order to make the online service available to as many seniors as possible, NCOA has created an organizational edition of BenefitsCheckUp for community service organizations, since a significant portion of seniors do not have access to computers or the Internet.<sup>24</sup>

1 Julia Gordon, *Equal Justice and the Digital Revolution: Using Technology to Meet the Legal Needs of Low-Income People*, 2002 Center for Law and Social Policy 2.

2 *Id*.

3 Id. at 6.

4 Id. at 8.

5 *Id*.

6 *Id*.

7 *Id*.

8 *Id*.

9 *Id*.

10 Id. at 11.

11 *Id*. at 17.

12 Id. at 14.

13 Julia R. Gordon, *Legal Service and the Digital Divide*, 12 Alb. L.J. Sci. & Tech. 809, 812 (2002).

14 Gordon, supra note 1, at 15.

15 Id. at 19.

16 Id. at 18.

17 Id. at 22.

18 Id. at 23.

19 Id. at 17.

20 Id. at 24.

21 *Id*. at 23.

22 Id. at 21.

23 *Id*.

24 Id. at 16.

#### Workload Guidelines

#### Scenario 1

Leonard P. was arrested and charged with possession of a firearm by a felon in one of the metropolitan areas of the state. The public defender office in that area handles a high volume of criminal cases. Assistant public defenders frequently complain that their high caseloads prevent them from thoroughly representing all of their clients. In addition, the trial calendaring practices of the jurisdiction are under the complete control of the prosecutor's office. As a result, defense attorneys often have multiple trial dates scheduled in a single week. Leonard's public defender saw him one time prior to the scheduled trial date. The attorney did not file any pretrial motions, even though Leonard vehemently claimed that he was merely one of four passengers in the vehicle where the weapon was found. Two days before trial, Leonard accepted a plea bargain from the prosecutor that required him to serve 60 months in prison, the presumptive sentence for such an offense.

#### Scenario 2

Five years ago, the public defender office that handles cases where Leonard was arrested conducted a caseweighted study to assess the appropriate workload for the attorneys in their office. The results of the study produced concrete guidelines that prevented assistant public defenders from being overwhelmed with cases. The guidelines were favorably received by the attorneys in the office and most of the defenders feel that the guidelines have assisted them in maintaining workloads that allow them to provide effective legal representation to all of their clients. When Leonard's case came through the intake process of the office, the supervising attorney immediately recognized that the defender to be assigned the case was operating at the workload limit. As a result, Leonard's case was assigned to another public defender with a lighter workload. This defender visited Leonard multiple times before the scheduled trial date, which resulted in the discovery of key facts. Subsequently, counsel filed and was granted a pretrial motion to dismiss the charges against Leonard.

#### Issue

Throughout the country, state and local governments struggle to support indigent defense systems adequately. Problems such as inadequate funding and lack of oversight over appointed counsel have led to excessive defender workloads that have significantly hampered the Sixth Amendment guarantee of effective assistance of counsel.1 Excessive defender workloads have been specifically and frequently cited as a major impediment to effective representation.<sup>2</sup> For example, a report by the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (ABA SCLAID) concluded that "lawyers are frequently burdened by overwhelming caseloads and are essentially coerced into furnishing representation that fails to provide the bare necessities for an adequate defense, resulting in routine violations of the Sixth Amendment obligation to provide effective assistance of counsel."3 Caseloads have reached such excessive levels that public defender offices around the nation have started to refuse to accept more cases. In November 2008, the New York Times reported that public defender offices in seven states had formally started to refuse to accept more cases.4

Lawyers are frequently burdened by overwhelming caseloads and are essentially coerced into furnishing representation that fails to provide the bare necessities for an adequate defense.

— Standing Committee on Legal Aid and Indigent Defendants, ABA, 2006

There is clear consensus among defense practitioners and criminal justice social scientists that defender workloads must be properly managed in order to increase the probability of competent legal representation and to mitigate the chances that an innocent person could be wrongfully convicted or punished by the state inappropriately. Yet, historically, public defenders have had very little control over the number of cases they receive.<sup>5</sup>

The problem of excessive defender caseloads is not limited to public defenders. Court-appointed attorneys and attorneys who contract to accept an unlimited number of cases in a given period can become overwhelmed as well.<sup>6</sup> This is especially true in the case of low-bid, flat-fee contracts, where the attorney is contractually obligated to handle every case during a given time period, regardless of case numbers.

The rules of professional responsibility make it clear that a lawyer must maintain a reasonable workload. In a 2006 opinion, the ABA Ethics Committee stated that the Model Rules of Professional Conduct require lawyers to provide competent and diligent representation to clients. In practice, public defenders and some private defense attorneys have found it difficult to control their workloads.8 The ABA SCLAID report found that "defense lawyers for the indigent are sometimes unable to comply with ethical ... requirements, and as a nation we tolerate substandard representation in indigent defense that is not acceptable practice on behalf of paying clients."9 Moreover, the tolerance of this substandard legal representation is typically characteristic of the entities charged with policing such behavior, as ethical violations committed by indigent defenders are often ignored by judges and disciplinary authorities.<sup>10</sup>

## **Establishing Caseload Guidelines**

States, counties, and defender organizations around the country have started to adopt attorney caseload guidelines using a variety of different methods.

Workload and caseload are not interchangeable terms, although they are sometimes used interchangeably. In fact, caseloads are a component of workloads, but they commonly serve as a proxy indicator for workload.<sup>11</sup> In some jurisdictions, caseload standards establish the maximum number of cases to be handled by an attorney in a given year.<sup>12</sup> In other localities, caseload standards are aspirational, in that they encourage indigent defense lawyers to accept reasonable caseloads in accordance with the rules of professional responsibility.<sup>13</sup>

Jurisdictions that have developed successful workload programs share a common set of characteristics, including:<sup>14</sup>

- A management information system that collects reliable and empirical workload data;
- A statistical reporting system that has been accepted by the funding sources;
- A sound managerial/administrative system;
- The ability to tie workload standards to budget requests; and
- A mechanism that kicks in once caseloads reach excessive levels to prevent defenders from being assigned additional cases.

# Caseload Guideline Methodologies

To develop caseload guidelines, individual defense agencies should conduct empirical workload studies within their own jurisdictions and develop caseload guidelines from those studies.

Public defense organizations should evaluate the dynamics unique to their offices and local jurisdictions and adjust the caseload guidelines accordingly. Some of the most notable variables affecting caseload limits include:

- The seriousness and complexity of the assigned cases;
- The specific policies and procedures of the local prosecutor's office;

- The local calendaring management practices;
- Differences in urban and rural jurisdictions and instances where attorneys must travel significant distances to and between court;
- Policies and programs that favor diversion for a significant number of non-violent offenders;
- Improvements in technology; and
- The increasing complexity of public defense practice, including developments in forensic evidence, sentencing guidelines, and collateral consequences of criminal arrests and convictions.

Two main study methodologies have been used to develop caseload guidelines: the Delphi method and the time-record-based case-weighting method.

- Delphi Method: Under the Delphi method, groups of attorneys are given a series of scenarios designed to reflect typical cases found in any public defender's workload. The attorneys are asked to estimate the time involved in handling different types of cases at various stages. The results are then used to develop case weights based on their educated guesses.
- Case Weighting Study: The case weighting method, which is the preferred method, uses detailed time records kept by indigent defense attorneys over a period of time. The time records provide a means by which caseloads can be translated in to workloads (the amount of effort, measured in units of time, for a lawyer to complete work on a caseload).

# Notable Approaches, Innovations and Strategies

- National Indigent Defense Policies and Regulations Regarding Caseload Guidelines
- National Advisory Commission on Criminal
  Justice Standards and Goals: In 1973, the
  National Advisory Commission (NAC) on
  Criminal Justice Standards and Goals issued a
  report that gave a number of suggestions to
  improve public defense services, including
  caseload standards for public defenders. The
  commission, which was appointed by the Federal
  Law Enforcement Assistance Administration, was
  made up of elected officials, law enforcement
  officers, corrections officers, community leaders,
  prosecutors, judges, and defense attorneys. The
  Commission's Standard 13.12 states that the
  caseload of a public defender should not exceed
  the following: 17
  - 150 felonies per attorney per year;
  - 400 misdemeanors per attorney per year;
  - 200 juvenile delinquency cases per attorney per year;
  - 200 Mental Health Act cases per attorney per year; or
  - 25 appeals per attorney per year.
  - Unfortunately, the NAC Standards were based on anecdotal information from commission members and lacked empirical support. Moreover, the NAC standards weighted all felonies and misdemeanors the same, regardless of the seriousness of the case or the amount of work involved. In addition, they were developed in 1973, before the widespread use of computers and other labor-saving technologies. The report also did not discuss how the standards should be implemented. Finally, the NAC standards use a numerical caseload equivalent, which is

not an accurate reflection of attorney workload and does not equate to a universal workload from jurisdiction to jurisdiction.<sup>19</sup> Consequently, indigent defense agencies have been unable to update the standards, and funding sources have displayed little interest in accepting them.

Since the development of the Standards, the American Bar Association (ABA) and the National Legal Aid and Defender Association (NLADA) have accepted them as a foundation from which local defenders and bar association leaders can develop local caseload standards. 20 The ABA and NLADA also state that individual defense agencies should conduct empirical workload studies within their own jurisdictions and develop caseload guidelines from those studies. In August 2007, the American Council of Chief Defenders (ACCD) adopted a resolution recommending that full-time public defender and appointed counsel caseloads not exceed the NAC standards.21

Despite their limitations, the NAC standards have served as a starting point in discussions regarding determining attorney workloads.

The American Bar Association's Standing Committee on Ethics and Professional Responsibility 2006 Opinion: In 2006, the American Bar Association's Standing Committee on Ethics and Professional Responsibility ("ABA Ethics Committee") issued its first opinion on the problem of excessive caseloads.<sup>22</sup> In the opinion, the ABA Ethics Committee stated that the Model Rules of Professional Conduct require lawyers to provide competent and diligent representation to clients.<sup>23</sup> Subsumed in these obligations is the responsibility that lawyers control their workloads such that each matter can be handled competently.<sup>24</sup> The Rules of Professional Conduct do not provide an exception for lawyers who represent indigent persons charged with crimes.<sup>25</sup>

Thus, if an indigent defense lawyer believes that her current workload is such that she is unable to meet the basic ethical obligations, the lawyer must decline the assignment of additional cases until the workload is back to a manageable level. <sup>26</sup> In addition, the lawyer may seek permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients. <sup>27</sup>

#### State Use of Caseload Guidelines

The chart on the next page shows the varying caseload standards or guidelines that have been adopted by different oversight bodies.<sup>28</sup>

- Colorado: The Colorado State Public Defender and the Colorado legislature used the results from a case weighted study to determine staffing needs in regional offices, to justify budget requests, and to analyze the potential fiscal impact of proposed legislation.<sup>29</sup>
- Wisconsin: Statutory Caseload Provisions:
  Wisconsin is one of two states that have public defender workload limitations written into statutory provisions. Wisconsin's statute provides that the caseload limitations are to assist in budgetary determinations. Other jurisdictions have caseload provisions in their statutes, but the statutory provisions do not set specific numeric limitations. Instead, they include language requiring public defenders to accept caseloads that allow them to provide effective representation or representation that comports with codes of professional responsibility. 32

## Impact Litigation

▶ State v. Joe U. Smith, Arizona Supreme Court (1984): Like public defenders, contract attorneys can have excessive workloads, particularly when they have entered into low-bid, flat-fee contracts to handle all of the cases in a given jurisdiction for a set price. In State v. Joe U. Smith, the

- Arizona Supreme Court struck down a county contract system and established a widely cited standard for assessing the constitutionality of a low-bid contract system.<sup>33</sup>
- ACLU and Columbia Legal Services Class Action Suit: In April 2004, the ACLU and Columbia Legal Services filed a class action suit against Grant County, WA alleging that Grant County public defender caseloads were excessive. The lawsuit was settled in November 2005, and Grant County agreed to comply with the standards endorsed by the Washington State Bar. Also as a result of the lawsuit, in 2005, the Washington Legislature enacted House Bill 1542 that
- established, for the first time, limited state funding for public defense programs that complied with the standards. Before the bill, all indigent defense was county-funded.<sup>34</sup>
- Litigation in Miami-Dade, FL: In September 2008, the Miami-Dade Public Defender Office sued the State of Florida for the right to refuse to accept more cases.<sup>35</sup> The initial ruling in the suit upheld the office's right to refuse more cases, but the state has appealed.<sup>36</sup> Caseloads in the Miami-Dade Public Defender Office when they sued the state had risen to 500 for felony attorneys and 2,225 for misdemeanor attorneys.

Examples of Caseload Standards and Guidelines						
Jurisdiction	Felony	Misd.	Juvenile	Appeals	Authority	
Statute						
Wisconsin	184.5	492	-	-	Statute	
Oversight Body						
Arizona	150	300	200	25	Judicial Opinion	
Florida	200	400	250	50	Florida Public Defender Association	
Georgia	150	400	250	25	Georgia Indigent Defense Council	
Indiana	200	400	250	25	Indiana Public Defender Commission	
Louisiana	200	450	50	250	Louisiana Indigent Defense Board	
Massachussets	200	400	300	-	Committee for Public Counsel Service	
Minnesota	100-120	250-400	175	-	Minnesota State Public Defender	
Missouri	40-180	450	280	28	Missouri State Public Defender System	
Nebraska	50	-	-	40	Nebraska Commission on Public Advocacy	
New York (City)	150	400	-	25	Indigent Defense Organization Oversight	
Oregon	240	400	480	-	Oregon State Bar	
Vermont	150	400	200	25	Office of Defender General	
Informational Use						
Tennessee	55-302	500	273	-	Weighted Caseload Study	
Colorado*	80–241	310–598	305-310	-	Weighted Caseload Study	

# Note on the Status of Workload Guidelines in North Carolina

The North Carolina statewide indigent defense system does not currently have formal caseload standards or limits. However, the North Carolina Office of Indigent Defense Services (IDS) has developed a caseload weighting system that numerically calculates the total office workload for public defender offices. When office workload totals within an office reach unacceptable levels, IDS attempts to provide additional attorney and support staff positions to that public defender office to reduce workload totals back to acceptable levels.

1 Gideon's Broken Promise: America's Continuing Quest For Equal Justice, 2004 A.B.A. Standing Comm. on Legal Aid and Indigent Defendants vi.

2 Norman Lefstein & Georgia Vagenas, *Excessive Defender Caseloads: A.B.A. Ethics Committee Weighs In*, The Champion, Dec. 2006, at 10.

3 *Id*.

4 Erik Eckholm, Citing Workload: Public Lawyers Reject New Cases, N.Y. Times, Nov. 8, 2008, at 2.

5 Keeping Defender Workloads Manageable, 2001 The Spangenburg Group for the Bureau of Justice Assistance 2.

6 *Id*.

7 Id. at 3.

8 Id. at 2.

9 Gideon's Broken Promise, supra note 1, at 38.

10 Id. at 39.

11 Keeping Defender Workloads Manageable, supra note 5, at 7.

12 *Id*.

13 Id.

14 Id.

15 American Council of Chief Defenders Statement on Caseloads and Workloads Resolution, 3 (2007).

16 Keeping Defender Workloads Manageable, supra note 5, at 8.

17 National Advisory Commission on Criminal Justice Standards and Goals § 13.12 (1973).

18 American Council of Chief Defenders, supra note 15, at 4.

19 *Id*. at 5.

20 Id. at 3.

21 *Id*.

22 A.B.A. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-411 (2006).

23 Id. at 3.

24 Id.

25 Id.

26 Id. at 5.

27 Id.

28 Keeping Defender Workload Manageable, supra note 5, at 11.

29 Id. at 9.

30 Wis. Stat. Ann. § 977.08(5) (1999).

31 Id.

32 Keeping Defender Workloads Manageable, supra note 5, at 13.

33 Id. at 14.

34 American Civil Liberties Union of Washington State, http://aclu-

wa.org/inthecourts/detail.cfm?id=370.

35 Eckholm, supra note 4, at 1.

36 Id.

#### Mission Statements

#### Scenario 1

John P. is charged with driving a vehicle while under the influence of alcohol. This is John's second DWI in the last three years. After the first conviction, John was sentenced to a short term in jail without any requirement for alcohol abuse treatment. The public defender office in the jurisdiction where John lives does not have a formal mission statement, but the attorneys in the office pride themselves on their litigation prowess. In the words of the Chief Defender, "The attorneys in this office are bulldog litigators. Their job is to win cases, not to fix client problems or be social workers." The defender assigned to John's case reviews the file and does not see any viable defenses, so he advises John to plead guilty. John follows the advice, pleads guilty, and is again sentenced to a term of imprisonment without any requirement for alcohol abuse treatment. Four months later, John is arrested for his third DWI.

## Scenario 2

After the arraignment and the appointment of counsel, the defender assigned to John's case conducts an initial interview. The public defender office where this attorney works has a mission statement that embraces whole-client representation. As a result, the defender reaches beyond the traditional boundaries of legal representation and seeks to address the underlying issues behind John's repeated DWIs. During the interview, the defender asks John about the facts of the case, John's previous DWI conviction, and John's alcohol consumption. John admits he has a problem with alcohol, but says he does not know how to quit. The attorney asks John if he is willing to enter alcohol treatment as a part of his punishment. John agrees to treatment, pleads guilty, and is sentenced to a term of imprisonment that includes mandatory participation in a substance abuse program. John is able to complete treatment and has not had another DWI.

#### Issue

Across the country, indigent defense agencies are working to improve the quality of legal services provided to clients. To facilitate this process, many offices have created mission statements to shape and develop the office culture. Generally, mission statements define an entity's reason for existence and embody the philosophies, goals, and mores of the organization. Mission statements of indigent defense agencies are no different, and they usually express a commitment to protecting a client's constitutional rights by providing effective legal representation. In recent decades, some indigent defense agencies have expanded their office mission statements to include helping clients address the issues that may have contributed to the clients' contact with the criminal justice system in the first place.

# Notable Approaches, Innovations and Strategies

Indigent defense agencies are utilizing mission statements to help define the philosophy and goals of their organizations. The mission statements of some indigent defense offices show that the offices remain committed to a traditional concept of the defense role, while other defender offices have embraced mission statements that articulate broader visions of what it means to provide quality legal representation. The following examples show how mission statements are being used by indigent defense agencies:

# Traditional Defender Mission Statements

The Maryland Office of the Public Defender:

"The mission of the Office of the Public Defender (OPD) is to provide superior legal representation to indigent defendants in the State of Maryland by safeguarding fundamental individual rights and ensuring access to the guaranteed protections afforded by the United States Constitution, the Bill of Rights, the Maryland Constitution and Declaration of Rights, and the laws of Maryland."

The Office of the Fresno County Public Defender, Fresno County, CA:

"The Law Office of the Public Defender is dedicated to the full and fair representation of all persons in our community who cannot afford legal counsel and are in danger of being deprived of a liberty interest due to a criminal accusation or other statutorily defined state action. It is the goal of the Public Defender's Office to protect every client's constitutional rights, to defend against discriminatory treatment and disproportionate punishment, and to ensure that no one who is innocent is ever wrongfully convicted. We are committed to providing all mandated legal services in an efficient and costeffective manner while holding ourselves to the highest professional and ethical standards."<sup>2</sup>

# Oklahoma Indigent Defense System, OK:

"To provide indigents with legal representation comparable to that obtainable by those who can afford counsel and to do so in the most costeffective manner possible. The Oklahoma Indigent Defense System is responsible for implementing the Indigent Defense Act by providing trial, appellate, and post-conviction criminal defense services to persons judicially determined to be entitled to legal counsel at state expense."

# Expanded Defender Mission Statements:

Neighborhood Defender Service of Harlem (NDSH), New York, NY:

"Making Justice a Reality for Those Farthest from its Reach. The Neighborhood Defender Service of Harlem is a non-profit model public law office whose dedicated staff is committed to providing the highest quality legal representation to inner city residents in Upper Manhattan. We are known internationally as the lead innovator in community-based, client-centered public defense practice. We involve civil and criminal attorneys, social workers, investigators, paralegals, and college and law school interns in the aggressive defense of our clients. We are dedicated to our mission—to make justice a reality for those farthest from its reach." <sup>4</sup>

NDSH is organized differently from traditional defender offices, which reflects its expanded role in the community. Its services go beyond direct legal representation to helping clients avoid future contact with the criminal justice system. The office employs civil and criminal attorneys, social workers, investigators, paralegals, and college and law school interns in the defense of their clients.

Knoxville County Public Defender Office, Knoxville, TN:

The Community Law Office of Knoxville, TN is dedicated to offering a continuum of services for individuals accused of a crime but unable to pay for legal counsel. By empowering clients to create a life skills development plan, CLO offers individuals an opportunity to restructure their life: a lifestyle makeover. By providing community members with quality legal representation, CLO helps reduce recidivism and crime in the community. Based on a holistic representative model, CLO works to reach beyond the traditional professional responsibility of legal counsel for clients.<sup>5</sup>

<sup>1</sup> http://www.opd.state.md.us/missionpolicy.html.

<sup>2</sup> http://www.co.fresno.ca.us/Department Page.aspx?id=3982.

<sup>3</sup> http://www.odl.state.ok.us/sginfo/oksg/indigent-defense.pdf.

<sup>4</sup> http://www.ndsny.org/mission.htm.

<sup>5</sup> http://www.pdknox.org/800main.htm.

